

Saint Thomas Aquinas on the Death Penalty

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SAINT THOMAS AQUINAS
ON THE DEATH PENALTY

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by
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ABSTRACT

**SAINT THOMAS AQUINAS ON THE DEATH
PENALTY**

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Catholic moral philosophers and theologians for centuries used Thomas Aquinas's defense of the death penalty as a point of reference in defending the state's right to execute. Recent Church documents such as *Evangelium Vitae*, however, seem to take a different approach to the question than Aquinas did. In secular contemporary treatments of the death penalty, Aquinas's account is often caricatured or simply overlooked. One of the reasons for this is the lack of a thorough treatment of the death penalty in the thought of Aquinas. This dissertation seeks to address that deficiency.

I present Aquinas's account of capital punishment as an example of determining civil punishments through the exercise of practical reason. Aquinas's thought sanctions neither an absolute acceptance nor an absolute rejection of the death penalty; for him, this is not a question that admits of absolutes. Like other punishments, the death penalty is a determination made by human reason. Its justification depends on specific historical and cultural circumstances and on the needs of the political community, as well as on the severity of the offense. Killing a guilty person is not intrinsically evil, in Aquinas's view,

but it is nonetheless a last resort, when nothing else can be done for the good of the community.

It may be that recent Church documents have avoided making use of the Thomistic teaching on the death penalty, even where this could have made their reasoning clearer, for fear that such arguments would be misunderstood, or in order to make a clearer case for forgoing the penalty. If this dissertation contributes to our understanding of what Thomas actually says about CP, it will be helpful in reconciling the thought of John Paul II with the tradition of Catholic thought on capital punishment, as well as in offering a reasonable way for thinking about punishments in general.

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Introduction

Why turn to Thomas Aquinas for philosophical insight into the problem of capital punishment? There are reasons to doubt the value of this approach. His account contains elements repugnant to the contemporary reader.¹ In responding to an objection that the death penalty cannot be just because “to kill a man is evil in itself,” Thomas says that “although it be evil in itself to kill a man so long as he preserve his dignity, yet it may be good to kill a man who has sinned, even as it is to kill a beast.”² He also frequently compares the political community to a living body, such that “the whole of man is directed as to his end to the whole of the community of which he is a part.”³ We will examine both these comparisons in what follows, to see the point that each attempts to convey. Yet we will also see that his argument does not depend on these comparisons as a conclusion on premises. Rather, he uses them as illustrations that, ironically, are supposed to clarify his point about punishment of the evildoer. They may indeed have clarified the case for his contemporary readers, but the fact remains that for us they tend not to clarify but to obscure.

Further, Aquinas’s reasoning about the death penalty is informed by the time in which he lived: the penal law, the nature of the mediaeval political order, and the

¹ His account also challenges some of our preconceptions about mediaeval political thought, as when Thomas says of a free people that “the consent of the whole people expressed by a custom counts far more in favor of a particular observance, that does the authority of the sovereign, who has not the power to frame laws, except as representing the people.” *S.T.* I-II, q. 97, a. 3, ad 3. References to the *Summa Theologiae* (*S.T.*) are from the translation by the Fathers of the English Dominican Province (Benziger, 1948). Where the translation might lead to confusion, I provide the Latin text in parentheses or footnotes. In the few cases where I give a different translation of a word or phrase, I also give the Latin (Edizioni San Paolo, 1988).

² *S.T.* II-II, q. 64, a. 2, arg. 3 and ad 3.

³ *S.T.* II-II, q. 65, a. 1.

particular threats and concerns of thirteenth-century political life. If the idea in looking at Thomas's theory of capital punishment were to introduce something like mediaeval penal law into twenty-first century American political life, this would clearly be ridiculous. Moreover, it would be contrary to Thomas's own conception of law, for he says that every change in law undermines the force of custom, which is one of the greatest forces in maintaining civil order.

Finally, one might think that Thomas's teaching on the morality of capital punishment is a matter for theology. This teaching has been a frequent point of reference for Catholic theologians and prelates up to the mid-twentieth century.⁴ Yet in recent Church documents, particularly in John Paul II's *Evangelium Vitae* and in the *Catechism of the Catholic Church*, one finds a near-total repudiation of the use of capital punishment. So the Catholic moral theologian may well want to look for continuity between the Thomistic justification and the recent Church statements. Yet is the morality of capital punishment only or primarily a theological question? Thomas himself does not assume this. Though he draws on scriptural support in his argument, and though there are theological foundations for his view of natural law as a whole, his justification of capital punishment is in fact a philosophical one.

In spite of the difficulties just mentioned, reading Thomas on capital punishment is a worthwhile exercise. His account, often misunderstood, ignored, or treated

⁴ Two recent studies have contributed to an understanding of this tradition: E. Christian Brugger's *Capital Punishment and Roman Catholic Moral Tradition* (2003) and James Megivern's *The Death Penalty: An Historical and Theological Survey* (1997). Both works provide evidence for a broad acceptance of the death penalty amongst Christian thinkers up until the mid-twentieth century.

summarily, has much to offer us, not least in challenging us to think more clearly about why and how we punish.⁵ In this thesis, I present Thomas's account of capital punishment as an example of determining civil punishments through the exercise of practical reason.

My thesis is that for Thomas Aquinas, the justification of capital punishment, like other punishments, depends on specific historical and cultural circumstances and on the needs of the political community, as well as on the severity of the offense. I do not claim to defend all aspects of Thomas's account in this thesis, which given the breadth of the issues involved, such as the nature of a just civil order and of the common good, would be impossible. Rather, I claim to explain that account more accurately by placing it in the context of his views on punishment in general and on the common good of the political community. In understanding this account better, it will be possible to dismiss some of the objections leveled against that account. Therefore, after explicating Aquinas's account, I show how some of the common objections to that account misinterpret him. In thinking through the question of CP with Thomas, I show how he offers a reasonable and internally consistent way for thinking about questions of punishment, in which specific punishments are reasonable but not necessary determinations of natural law.

This project may also be seen in light of the theological framework I mentioned above. That is, I am doing the philosophical groundwork for a theological account that

⁵ John Finnis and Stephen Long have both given careful analysis to Thomas's account of CP. Both offer valuable insights into his thought, though I will disagree with certain aspects of their accounts (see Chapter IV).

would reconcile John Paul II's account of CP with that of Aquinas. Yet this theological framework is not essential to understanding my thesis. One of the ways we learn to reason about practical matters is by reasoning along with one who possesses the virtue of prudence. Thomas possesses this virtue to an exceptional degree. In reasoning along with him, then, we will see how the prudent man goes about judging in matters of civil punishment, and in so doing become more capable of making prudential decisions in matters of punishment in our own circumstances. Aquinas's account should be of interest not only to the Catholic, but also to anyone concerned with the justification of punishment in general and of CP in particular.

A Background and Sources

Thomas Aquinas was born in 1225 at Roccasecca (near the city of Naples) to Theodora and Count Landolfo of Aquino.⁶ Christendom at the time of Thomas's birth was fighting both internal divisions, in the form of heresies and conflicts between imperial and papal power, and external threats from Moslem armies. Thomas's early education was at the monastery of Monte Cassino, which he left around 1239 to continue his education at the University of Naples. Thomas's father, Count Landolfo, was originally under allegiance to the German emperor Frederick II, but began to support the papacy in opposition to the emperor around 1245, a move that put the family in some

⁶ Historians consider 1225 the most probable date; he may have been born a year earlier or as late as 1227. For a good treatment of the life of Thomas Aquinas, see Torrell, *Saint Thomas Aquinas, Vol I: The Person and His Work*.

danger; Thomas's brother Rinaldo was put to death for alleged conspiracy against the emperor.

Political strife did not prevent the thirteenth century from being a time of intellectual fecundity. James Walsh points out that this was the century of Gothic cathedrals, of the art of Giotto and the poetry of Dante, of the foundation of the university, of the signing of Magna Charta, of the origin of representative government, of great kings like St. Louis of France, of great saints like Francis and Dominic, and of great scholars like Albertus Magnus and of course, Thomas himself.⁷ The remarkable synthesis of Greek philosophy and Christian thought achieved by St. Thomas could not have happened at just any time in the Middle Ages. The "scholasticism of the thirteenth century occupies a central place in the evolution of ideas in the Middle Ages ... it unifies, completes and consolidates the doctrines of the earlier Middle Ages ... it inspires all the speculation of the few subsequent centuries, and is therefore rightly regarded as the culmination of Medieval Scholasticism."⁸

The thirteenth century was a fruitful time for philosophical thinking about law and punishment, as well as the more abstract theological questions. Developments in canon law at this time are particularly notable. The monk Gratian had collected all the scattered canons of ecclesiastical law into a single textbook, called the *Concordia discordantium canonum* (known as the *Decretum Gratiani*) around 1140. Gratian's *Decretum* replaced all earlier collections of canons and improved upon them by ordering

⁷ Walsh, *The Thirteenth: Greatest of Centuries*, Introduction to Chapter I.

⁸ Maurice De Wulf, *History of Medieval Philosophy*, Trans. P. Coffey (New York: Longmans, Green, and Co., 1909), c. III, a. 3: n. 265 (italics and note omitted).

the texts systematically and attempting to reconcile any contradictory canons. Gratian's work lay the foundation for future canonists such as Johannes Teutonicus (c. 1215), who commented on and applied the principles found in the *Decretum*, continuing to seek resolution to the problems produced by contradictory canons.⁹ In 1234, the Dominican Raymond of Peñafort, under Pope Gregory IX, updated Gratian's *Decretum*, adding recent canons and further systematizing the body of Church law.¹⁰

Civil law also flourished in the twelfth and thirteenth centuries. The law school at Bologna was founded in the early twelfth century and began to draw students from all of Italy and from most of Europe. At Bologna, the body of civil law inherited from Rome "became an object of systematic academic research and teaching for the first time in history."¹¹ This was a conscious revival of Roman law, following a rediscovery of Justinian's *Corpus Iuris Civilis*, which had been mostly neglected in the West until the twelfth century.¹² The Germanic kingdoms that succeeded the Roman Empire had personal law codes, in which each person was judged according to the law of his own people. At the time of Charlemagne and afterwards, personal law began to be replaced by territorial law, which imposed a single legal system on all the inhabitants of a territory.¹³

It was not until the twelfth century, however, that scholars attempted to construct a system of legal norms to govern social life. The *Corpus Iuris Civilis* was a compilation of Roman law overseen by the emperor Justinian in 529 and 534 AD; it consisted of

⁹ Megivern, *The Death Penalty: An Historical and Theological Survey*, 86, 88, 92 ff.

¹⁰ Coleman, *A History of Political Thought*, 30-31.

¹¹ Mäkinen and Pihlajamäki, "The Individualization of Crime in Medieval Law," 525.

¹² *Encyclopedia of the Middle Ages*, s. v. "Roman Law."

¹³ Edward M. Peters, "Prison Before the Prison: The Ancient and Medieval Worlds," in *Oxford History of the Prison: The Practice of Punishment in Western Society*, 23.

three works, the *Institutes*, *Code*, and *Digest*.¹⁴ The legal scholars of the 12th to 14th centuries used Justinian's work as a foundation for their own. They adapted to their own circumstances the principles of Roman law found in Justinian's compilation, creating a legal system which was, as one political historian puts it, "selectively saturated with the law of imperial Rome."¹⁵

It is worth noting that the center of law study was in Thomas's homeland; Italy was the place where legal thought and practice most flourished in the thirteenth century:

In spite of the diversity of jurisdictions across the Italian peninsula, a common result of the influence of learned law on local custom and practice here ... was its impact on the area of legal procedure and the rules of evidence. Most jurisdictions adopted the inquisitorial procedure of Roman law and canon law, the rules of evidence in learned law, the specialization of a legal profession, and the institutions of punishment for criminal offenses.¹⁶

One example of the effect of this legal renaissance was the implementation of the law of proof. "Before the twelfth-century revolution, law of evidence in Europe relied on the system of ordeals and oaths."¹⁷ Ordeals were devised in order to ask for divine intervention to decide a person's guilt or innocence.¹⁸ By forbidding clergy to participate in trials by ordeal, the Fourth Lateran Council (1215) already marked a turn away from the practice, a turn that was solidified in the following century: "Ordeals and oaths were replaced in the thirteenth century by what have been called 'rational proofs' ... This new

¹⁴ Peters, 17.

¹⁵ Coleman, 6.

¹⁶ Peters, 42.

¹⁷ Mäkinen, 537.

¹⁸ While clearly alien to modern judicial methods, the ordeal did not always lead to indiscriminate persecution. It was usually employed in undecided cases, where there were no witnesses or conflicting evidence, for example. It was preceded by a period of fast, in which the parties involved had time to come to a settlement. Due to the difficulty of interpreting the results, it often led to acquittal. Sometimes it was used mainly as a rhetorical device, willingness to undergo the ordeal being cited as a proof of a defendant's veracity. *Encyclopedia of the Middle Ages*, s.v. "ordeal."

system was based on the idea that ‘full proof’ consisted of either the defendant’s confession or the concurring statements of two eyewitnesses.”¹⁹ The legal developments are significant to Thomas’s thought on punishment, both because canon law was one of his sources, and because of the nature of the subject.

In general, Scripture is foremost among Aquinas’s sources, and his discussion of punishment is no exception. He devotes several questions to the Mosaic Law in the *Summa Theologiae*, to which we can look for the relationship between a Thomistic view of punishment and the penal code found in the Pentateuch. The scriptural references relevant to the discussion of punishment, from both the Old and New Testaments, will be dealt with as they arise in relation to punishment in general, and CP in particular. As mentioned above, canon law is a source for Thomas, who cites the *Decretals* in a variety of topics in the *Summa Theologiae*.²⁰ He also refers, less frequently, to the sources of civil law, such as Justinian’s *Code*.²¹ For his discussion of topics related to justice (including punishment), Thomas relies on Aristotle’s *Nicomachean Ethics* and his *Politics*.

B Assumptions

In any philosophical undertaking, there must be assumptions. In addressing a specific ethical question, such as the legitimacy of CP, one must make many assumptions in order to get to the heart of the argument. The assumptions most relevant to this thesis

¹⁹ Mäkinen, 538.

²⁰ See *S.T.* I-II, q. 90, a. 4, s.c.; q. 94, a. 5, s.c.; II-II, q. 1, a. 10; q. 68, a. 1; q. 99, a. 1; q. 151, a. 3.

²¹ See for example *S.T.* II-II, q. 154, 10.

are those pertaining to the Thomistic view of human action and of natural law. I assume that we have knowledge of first principles in both the speculative and the practical realms. This knowledge of first principles is not something we acquire, but is in us habitually. The knowledge of first practical principles is what Thomas calls *synderesis*. These first practical principles are the basis for natural law precepts and the source of the precepts of human law. I assume a Thomistic account of human action, of acts of the will and the moral analysis of human action, which becomes important in considering the act of CP itself. Finally, I assume that there is such a thing as legitimate authority, without which it would be impossible to appreciate Thomas's account of punishment.

Of course, none of these assumptions is noncontroversial. Books have been written in critique and in defense of each one of them. I will not attempt to defend them in any systematic way. There is a practical reason for this: to make this a manageable project. Yet there is a more fundamental reason as well, for Thomas's views of natural law and human action are founded in his metaphysical and theological views. Thomas defines natural law as a participation in the eternal law, and this divine origin is what makes natural law a law, and what assures of the *goodness* of our most basic inclinations. Revealed theology, especially in the Decalogue, assures us also of the goodness and malice of certain kinds of actions. It confirms the goodness of our inclination to punish evil actions, through instances of divine punishment and through the prescription of specific human punishments under Mosaic Law. In this thesis, I do not seek to encompass the whole of this rich and deeply interconnected view of human activity, but to focus on

one particular aspect of it, on the human response to grave evils committed within the context of the political community.

C Order of Presentation

Aquinas defends the use of the death penalty in civil law, but not as a necessary conclusion from natural law. In fact, his teaching on the derivation of precepts from natural law rules out this possibility. Capital punishment, like other punishments, is a specific determination from natural law, which varies according to the circumstances. Laws prescribing certain punishments have the force of human law; they do not have the force of natural law. For him, then, the death penalty is a legitimate but not a necessary penalty for civil society.

The main source for Aquinas's theory of CP is an article in the question on murder (*Summa Theologiae* II-II, q. 64, a. 2). A chapter in the *Summa Contra Gentiles* (Book III, c. 146) is a second source. Yet these brief treatments will appear deficient if not read in the context of what Aquinas has to say about the nature and end of punishment in general. In Chapter I, therefore, I deal with his theory of punishment. He maintains that punishment is an evil, but it is not the primary kind of evil. The evil of fault, which is an evil in the will, is evil most properly. Punishment, on the other hand, is evil in respect to the one who suffers it, but it is not evil *per se*, as fault is. Considered in itself, punishment is good, since it is an act of the virtue of justice. The end of punishment is to redress the disorder produced by an offense. This is sometimes called

retribution by modern authors. In the realm of human affairs, punishment focuses on restoring the civil order, or the political common good. Aquinas also says that human punishment is medicinal. Human punishment is still retributive—if it were not, it would not be punishment—but it makes use of retributive acts to serve medicinal ends, such as deterrence. Human punishment is legitimate insofar as it serves the common good of society by curbing evils in the community.

In Chapter II, I describe Aquinas’s teaching on CP. The first part of this teaching is Aquinas’s understanding of the act of killing a person as a form of punishment. This teaching is explicitly articulated in the *Summa* and elsewhere. The morality of a human act, according to Aquinas, is determined primarily by its object, which is “the end as the reason for willing the means.” The object gives the act its moral species, but circumstances may sometimes enter into the description of an act in such a way that they alter the object and therefore the moral species of the act. This is the case with CP. The guilt of the person being killed and the authority of the one killing both enter into the description of the act; they specify the act as an act of punishment, not of murder.

The second part of this chapter deals with CP as a social institution. What I say here is derived from Aquinas’s teaching on human law and custom. For Aquinas, particular punishments are determinations of natural law. He distinguishes two ways in which something may be derived from natural law: the first is by a necessary conclusion from a precept; the second is by determination from a more general precept. The first way is similar to the way a conclusion is derived from premises in the speculative reason, and the second way is similar to the determination that a craftsman makes in practicing his

craft. Aquinas maintains that punishments are determinations of the natural law rather than necessary conclusions. Therefore, they have only the force of human law, and not the force of natural law. That is, we can say of any particular type of punishment that it could be otherwise. In this part of the chapter, I also examine the role that Thomas assigns to custom in shaping and modifying human law. He argues that custom, as the manifestation of reason in deed, “has the force of law and interprets law.”

In Chapter III, I address Aquinas’s claim that the political common good is prior to the individual good. This claim is founded on the general principle of the priority of the whole to the part. Aquinas takes it as evident that every whole, as a whole, is prior to its part. He makes the important distinction that political society is not a substantial whole, but an accidental whole, having a unity of order. Nonetheless, an accidental whole is still a whole, and as a whole, it is prior to its parts. Yet because the political society is not a substance, it does not have absolute priority over its parts. The individual person is part of the political society, but he also has an end that surpasses the entire political order. “Man is not ordained to the body politic, according to all that he is and has.”²²

The priority of the political community is the superiority of the community’s good to the private goods of its individual members. When Thomas asserts the priority of the political community, he is making the metaphysical claim that the individuals, as parts, are ordered to the community, as a whole, and also the normative claim that the community’s good ought to be preferred to the individual’s private good. There is an order among proper human goods, such that some are higher than others. The political

²² *S.T.* I-II, q. 21, a. 4, ad. 3.

common good is the highest of proper human goods, since the political community includes all other (human) communities; it organizes and governs the whole of temporal life. To be excluded from the political community is more radical than to be excluded from other human communities. Death is the most certain (and in some cases the only) means to exclude a member from the community, but there are others: Aquinas mentions exile, and I suggest that life-imprisonment is a contemporary option similar to exile.²³

In Chapter IV, I answer philosophical objections to Thomas's account of CP.

Thomas answers some objections in the course of articulating his own view, and these are treated in Chapter II, but there are other objections, which he does not explicitly address. In order to limit the number of objections to a manageable amount, I have chosen those objections that can be posed by reference to other tenets which Thomas holds, those that charge him with an inconsistency, or offer an alternative interpretation than the one I present. I do not answer objections that disagree with the basic approach that Thomas takes to ethical questions. These objections are, however, representative of the objections that generally are leveled against his account, from various alternative approaches to ethics such as the utilitarian and the deontological.

The objections are of two main kinds. The first argues that the act of CP is *per se* evil, because Aquinas's view of human action implies that intentionally killing a human person is *per se* evil. Yet Aquinas's view of human action does not imply this conclusion, and if it did, it would also imply that other forms of intentional harming were illicit. The second kind of objection argues that the political common good is supposed to serve the

²³ S.C.G. III, c. 144, n. 4.

good of individuals, and therefore the common good is not superior to individual goods. Since Aquinas's justification of CP presumes that the common good is superior, his justification fails. I argue that Aquinas can maintain both that the political common good serves the good of individuals and that it is superior to the good of individuals. He can do this because he understands happiness as a divine good, which is by its genus superior to all human goods, while the political common good is the highest good in the genus of human goods, and therefore superior to individual human goods.

In the last chapter, I defend the value of Thomas's theory of the determination of punishment: why we might want to retain the principles of this theory, even if we apply them differently. I suggest a way of applying the principles he articulates to present-day circumstances, presenting a contemporary philosopher as an illustration.

Chapter I: Saint Thomas on Punishment

One might expect a treatment of a great philosopher's position on a specific topic to begin with his writings on that specific topic. That will not be my approach, and perhaps this requires some justification. When read in isolation, Thomas's treatment of capital punishment in the *Summa Theologiae* (one article of less than 800 words) appears perfunctory. After this article, he moves on to other topics such as private revenge and suicide. The treatment in the *Summa Contra Gentiles* is equally terse. The historical context helps make sense of why the legitimacy of capital punishment was not a hotly disputed question in the 13th century; it was largely taken for granted. Yet the shortness of Thomas's account should not lead us to think his defense of CP was unreflective deference to a cultural norm. For Thomas, capital punishment is the most severe form of punishment on a continuum with other, less severe forms of punishment.¹ His account of capital punishment therefore must be understood within the context of his account of punishment in general. While Thomas does not devote an entire treatise to punishment, he treats it in question 48 of the *Prima Pars*, and again, more extensively, in *De Malo*.²

In this chapter, I address Thomas's views on punishment in general, beginning with punishment as an evil (A). From the perspective of the one being punished, the "patient," punishment is an evil, something undesirable. Yet from the perspective of the one who inflicts it, the agent, punishment is a good. For evaluating the goodness of

¹ While the death penalty does raise particular questions, so do the punishments of maiming, beating, and imprisonment, which he also treats. See *S.T.* II-II, qq. 64, 65.

² The date for the composition of *De Malo* is uncertain, but Torrell suggests Thomas's second period in Paris (1268-1272). *Saint Thomas Aquinas, Vol. 1: The Person and His Work*, 201-207. Torrell notes that the manuscript was beginning to circulate around 1270. This would make *De Malo* a later work than the *Prima Pars*. All references to *De Malo* are from *On Evil*, translated by Jean Oesterle (Notre Dame, IN: University of Notre Dame Press, 1995).

human acts, the perspective of the agent is primary, since the moral species of an act is determined by what the agent does (the moral object of the act) rather than what the patient suffers. Therefore, the act of punishment is the focus for Thomas, and the focus of this chapter. After a preliminary account of the nature of the human act according to Thomas (B.1), I address punishment as an act good in kind (B.2), an act of the virtue of justice (B.3). The object of an act of punishment, what makes it to be an act of punishment, is the restoration of order by depriving the guilty party of some good. This is a specifically good act, and therefore the act of punishment is good simply (an act of the virtue of justice), and evil only in a relative sense.

In order for a specific act of punishment to be good, its end must also be good.³ That is, in addition to serving the good of order, which punishment does simply by virtue of the kind of act it is, punishment may serve a number of remote ends, such as reforming the offender or deterring others from similar offenses. In the third part of the chapter, I address the ends of punishment, both of eternal (C.1) and of temporal punishment (C.2). Finally, I explain Thomas's important and often misunderstood statement that temporal punishment is sought primarily as medicine (C.3).

A Punishment is Evil in a Certain Respect

The word often translated as punishment or penalty in *De Malo* and the *Summa* is *poena*, which also may be translated as pain in some contexts.⁴ In English, we distinguish

³ In Chapter II, I consider the moral categories of object and end in more detail.

⁴ The Fathers of the English Dominican Province translate it as pain in q. 48 of the *Prima Pars*. Jean Oesterle translates it as punishment in *De Malo*, q. 1. Lewis and Short's *Latin Dictionary* gives "indemnification, compensation, satisfaction, expiation, punishment, penalty" as the first meaning of

between “punishment” or “penalty,” and “pain.” Legal punishment is included in Thomas’s *poena*, but that is not all it includes. *Poena* includes all kinds of pains that seem to have no relation to a legal order: sickness, poverty, mental distress, and the pains of old age, for example. For Thomas these pains can be called punishments because all the pains of this life, all suffering and death itself, are punishment for original sin.⁵ We need not be detained here with the question of whether Thomas is right to refer to all suffering and death as punishments. I will follow St. Thomas in speaking of punishment broadly, so as not to exclude anything that may potentially fall under that heading. Later, our focus will be narrowed to include only civil punishments.

A.1. The Problem

How can it be right to treat someone who has committed a fault in a way in which it would be wrong to treat anyone else? One who punishes inflicts some harm on another, and yet because he inflicts it as a response to evil, the character of his act seems to differ from other sorts of harm. “Now it is unlawful to do a person a harm, except by way of punishment in the cause of justice,”⁶ says Aquinas, and Aristotle observes that “a victim who retaliates does not seem to do injustice.”⁷ What is this “air of paradox,” as contemporary moral philosopher George Sher calls it, “that surrounds the assertion that

poena. The second meaning is a transference of the first: “hardship, torment, suffering, pain, etc.” Oxford: Clarendon Press, 1998.

⁵ See *S.T.* I, q. 48, a. 5. Both the idea of fault and the idea of punishment are contained in original sin. For Adam and Eve this sin had the nature of a personal fault. Since all men are present in the first man, all men bear the guilt of that original fault. Punishment for that fault is present even in those cleansed of its guilt by the sacrament of baptism.

⁶ *S.T.* II-II, q. 65, a. 2.

⁷ *Nicomachean Ethics*, trans. Terence Irwin, 2nd ed. (Indianapolis: Hackett, 1999), 1138a 22. All references to the *Ethics* are from the Irwin translation.

actions that are wrong in ordinary contexts are permissible or mandatory as punishment”⁸ Aristotle assumes that most people share the sense that there is a difference between harming someone for a wrong he has committed and harming for other reasons, and experience bears this out.⁹

Since loss of one’s life is a particularly serious harm, the difference between inflicting death as punishment and inflicting death for any other reason is a critical question. Yet the problem is also present in justifying punishments of other kinds. Punishment always involves some harm to the wrongdoer.¹⁰ The harm may be the loss of material goods, liberty, reputation, bodily health or integrity, membership in the civil or spiritual community (exile or excommunication), bodily life, or eternal life. All punishment carries with it the idea of something unpleasant and painful, of some harm. Someone may willingly accept, or even seek, a punishment, but not for the sake of the punishment, which in itself is repulsive to the will. For example, a thief may regret his crime and turn himself in, desiring to put burglary behind him and begin a new life. He is willing to be imprisoned for what he has done; he desires to make things right with society and within himself, and for these reasons he in some sense desires punishment.

Thomas acknowledges that punishment is a form of harm inflicted on another, yet he also recognizes punishment as a just exercise of civil authority. If punishment is in itself harmful and undesirable, what then must we say about the one who inflicts it? One of the first principles of the natural law, according to Thomas, is not to inflict harm on

⁸ *Desert*, 69.

⁹ “If someone illegally and willingly inflicts harm on another, not returning harm for harm, he does injustice.” *Ethics* 1138a7.

¹⁰ In general, I use the terms wrongdoer, offender, and sinner interchangeably to refer to any violator of law (human, natural, or divine). The term criminal has the sense of a violator of human (civil) law.

any person.¹¹ Simply put, if to harm another is to do evil, and to punish is to harm, then to punish is evil. At the same time, punishments seem to be just responses to certain kinds of behavior. The act of punishing seems to be at the same time good (virtuous) and evil.

A.2. The Nature of Evil

In order to solve the paradox of how punishment can be both virtuous and evil, Thomas first distinguishes between the subject of evil (the bad man) and evil itself (badness):

Just as the color white is spoken of in two ways, so also is evil. For in one way when white is said, it can refer to that which is the subject of whiteness; in another way to the whiteness itself, namely the accident or quality itself. And likewise when evil is said, it can refer to that which is the subject of evil, and this is something; in another way, it can refer to the evil itself, and this is not something but is the privation of some particular good.¹²

Thomas is following Augustine, who “says that evil has no positive nature, but the lack of good has received this name.”¹³ If we speak of evil itself, we must keep in mind that we are not speaking of something that exists in itself, but of a privation in something that exists in itself (the subject of evil). Thomas continues:

In order to show [that evil is a privation], we must consider that good properly speaking is something inasmuch as it is desirable, for according to the Philosopher [*Ethics* I.1.1094a2-3], they have best defined good who say that good is that which all things desire. But that which is opposed to good is called evil; hence evil must be that which is opposed to the desirable as such. But it is impossible for this to be something...¹⁴

¹¹ See *S.T.* I-II, q. 94, a. 5, ad 3.

¹² *De Malo*, q. 1, a. 1.

¹³ *D.C.D.* XI, c. 9, in *De Malo*, q. 1, a. 1, s.c.

¹⁴ *De Malo*, q. 1, a. 1.

The good is that which all things desire, and every nature desires its own being and perfection as good. Here desire is not limited to conscious, much less rational appetite. For Thomas, as for Aristotle, every natural thing has a goal and can be said in some sense to desire that goal.¹⁵ This is an instance of the general principle that potentiality desires actuality, since actuality is superior to potentiality. There is a tendency in every nature toward its own particular end, its perfection as violet or trout or man.

Evil, on the other hand, is opposed to what is desirable (we might describe it as ‘that which all things shun’). As opposed to the desirable as such, evil cannot be something. In other words, evil cannot be in a nature; it cannot constitute a nature.¹⁶ If evil were in a particular nature (that is, if there were a nature *per se* evil), then a being of this nature could not desire its own being, for it is impossible to desire in itself that which is in itself opposed to the desirable. This contradicts the principle mentioned above, that each nature desires its own being and perfection. Therefore, each nature is good *per se* and no nature is evil *per se*.

If no nature is evil then does evil exist at all? Thomas will answer, yes, but only accidentally. As noted above, we can speak about evil in two ways: the subject of evil or evil itself. When we speak of evil itself, we speak of that which has accidental existence and not *per se* existence. Evil itself “is not a thing; but that to which evil happens is a

¹⁵ “Even things which lack knowledge can be made to work for an end, and to seek the good by a natural appetite ... For, by the fact that they tend to their own perfection they tend to the good, since a thing is good to the extent that it is perfect.” *Summa contra gentiles: Book Three: Providence, Part I*, Trans. Vernon J. Bourke (Notre Dame, ID: University of Notre Dame Press, 2001), c. 24, n. 6. All references to the *Summa contra gentiles* (*S.C.G.*) are from this edition. Part 2 of Book III (1975) is also translated by Bourke. Book I (1975) is translated by Anton C. Pegis, Book II (2001) by James F. Anderson, and Book IV (1975) by Charles J. O’Neil.

¹⁶ *S.T.* I, q. 48, a. 1.

thing.”¹⁷ Evil itself is the privation of a particular good.¹⁸ A privation, like any accident, does not exist in itself; it is the lack in a nature of something that belongs to that nature. When we speak of the subject of evil, we speak of that in which the accident of evil inheres. The subject of evil is good *per se* (its nature is good), but evil accidentally.

The notion of evil as a privation is not a simple notion, but requires another distinction, that between a privation that is *evil simply* and one that is *evil in a particular respect* (a distinction that will be crucial to defining punishment). According to Thomas, something is evil simply if it is “deprived of a perfection proper to its nature” (*privatur aliquo particulari bono quod est ex debito suae perfectionis*).¹⁹ For example, it is evil simply for a dog to be missing a leg, since being a quadruped belongs to the perfection of the nature of dog. We would not speak normally of a three-legged dog as an evil dog or a bad dog, because we associate those terms with moral evil (i.e., evil in the will, which will be treated below), but here there is no question of moral evil.²⁰ We might also speak of a driver who lacks depth-perception as a bad driver, depth-perception being a perfection proper to one who drives a vehicle (again, no moral evil here). These examples show that it is possible to speak of something as evil simply, without implying moral evil.

Something is *evil in a particular respect*, on the other hand, “which is not evil in itself but to something else because, namely, it is not deprived of some good that belongs to its own due perfection but that belongs to the due perfection of another ...”²¹ For

¹⁷ *De Malo*, q. 1, a. 1.

¹⁸ *Ibid.*

¹⁹ *De Malo*, q. 1, a. 1, ad 1.

²⁰ When we do call a dog bad, it is usually because we are treating the animal as if his actions proceeded from deliberate choice, which is proper to rational creatures.

²¹ “quod est de debito perfectionis alterius rei.” *De Malo* q. 1, a. 1, ad 1.

example, lack of the form of water in fire is not an evil simply speaking, since the form of water is not a perfection proper to fire.²² Yet considered in itself, fire lacks the form of water, and that lack can be called an evil in a manner of speaking. Punishment is an evil of this kind: evil in a particular respect (as a passion), but good simply (as an action).²³

The two senses of evil, evil simply and evil in a particular respect, are called fault and punishment when they exist in an intellectual nature.²⁴ The two-fold division of evil into fault (*culpa*) and punishment is based on the two-fold nature of act (and the two-fold nature of good, since the degree of goodness corresponds to the degree of perfection or actuality). “The first act is the form and integrity of a thing; the second act is its operation,” and while the first act is more basic, the second act is more perfect.²⁵ Since act and perfection are chiefly what is meant by good, and since evil is understood as a privation of the good, the distinction of evil follows the distinction of act. Withdrawal of a form is the evil that corresponds to first act; this is the evil of punishment. This evil deprives man of something that he can use (well or ill) for operation. Withdrawal of the due operation is the form of evil that corresponds to the second act; this is the evil of fault.²⁶

Thus, evil turns out to be a complex notion: we can speak of evil in a subject or of evil itself. Evil itself is a lack or privation, but this privation may be evil simply or evil in a certain respect. When dealing with rational beings, evil simply is fault, and evil in a

²² *De Malo*, q. 1, a. 1, ad 1.

²³ *De Malo*, q. 1, a. 1, ad 1.

²⁴ Intellectual natures have a special relation to good and evil, which consists in the fact that good and evil in the will make the man a good man or a bad man. *De Malo*, q. 1, a. 4.

²⁵ *S.T.* I, q. 48, a. 5.

²⁶ *S.T.* I, q. 48, a. 5 and *De Malo*, q. 1, a. 4.

certain respect is punishment. Punishment is a privation in the agent, a lack of some form in the agent. Fault, on the other hand, is a privation in operation, an evil act. Since our concern is with evil in rational creatures, we will now consider fault and punishment more closely.

A.3. Punishment and Fault

Evil has a particular character in rational natures: *poena* and *culpa*. In the *Commentary on the Sentences*, Thomas describes *poena* as a species of *malum naturae*. That is, any privation of a form or perfection in a natural thing constitutes a natural evil. When it is a privation of some perfection in a rational nature, it is called punishment. *Peccatum* is a privation in an operation of a natural thing. *Culpa* is a privation in the operation of a rational thing.²⁷ Thomas carries this basic contrast between punishment and fault throughout his discussion of evils in later works like the *Summa* and *De Malo*.

In *De Malo*, he gives three ways in which punishment and fault differ. First, punishment “has regard to fault,” which means that in punishment, properly speaking, someone “suffers evil for some act he has committed.”²⁸ In other words, punishment is suffered on account of a fault. Punishment deprives the offender of some good that he desires, or corrupts some form in him.²⁹ Second, punishment is contrary to the will, whereas fault is according to the will. “For everyone’s will is inclined to his own good;

²⁷ *Super sent.* II, dist. 35, q. 1, a. 1.

²⁸ *De Malo*, q. 1, a. 4.

²⁹ A punishment destroys some accidental form, such as wealth or freedom of movement, but not the substantial form. For Thomas, the soul, the “first principle of life,” is the substantial form (the form that makes something to be a substance). Even the punishment of death does not destroy the substantial form. See *S.T.* I, q. 76, a. 4.

hence to be deprived of one's own good is contrary to the will."³⁰ Punishment may be contrary to the will in three senses. Punishment is contrary to the *actual will* of the wrongdoer, when he knowingly and unwillingly undergoes punishment (this is what most commonly goes by the name punishment).³¹ It is contrary to his *habitual will*, when he is unaware of the punishment he suffers, but would perceive it as a loss (as when someone does not know he has been robbed). It is contrary to the *natural inclination of the will*, when what is lost is not perceived as a loss by the person, even though it deprives him of a good absolutely speaking (as when punishment is willingly undergone). In order to be punishment, the evil must be contrary to the will in one of these senses. Finally, punishment "consists in a kind of suffering or undergoing," since it arises from a principle extrinsic to the will, while "fault consists in doing or acting."³² Thus fault is an evil in an intellectual nature that is according to the will and done by an agent, and punishment is an evil suffered by an agent, contrary to his will, on account of some fault.

The word fault is sometimes used interchangeably with the word sin, but since Thomas does not mean exactly the same thing by the two terms, it will be helpful to note his meaning here. In the general sense, a sin (*peccatum*) is produced by an agent not attaining the end for which he acts. In this sense, the grammarian "sins" when he makes a grammatical error, while intending to write correctly, and nature "sins" when she

³⁰ *De Malo*, q. 1, a. 4. See also *S.C.G.* III, c. 141.

³¹ It does not seem necessary that the person suffering the punishment understand his suffering precisely as punishment. What is necessary for the punishment to be against his actual will is that he knows that he is suffering something and that he does not want to suffer it.

³² *De Malo*, q. 1, a. 4.

produces a deformed offspring.³³ In *De Malo*, however, he stresses the proper sense of *peccatum*, which is a deficiency in an agent's will, when "the will fails in its due end through tending to an undue end."³⁴ This proper moral sense of *peccatum* is assumed where Thomas defines sin as an inordinate (*inordinatus*) or vicious (*vitiosus*) human act.³⁵ A sin is also an offense against God: Thomas cites Augustine's traditional definition: sin is a word, deed, or desire contrary to the eternal law.³⁶ Yet this theological significance does not prevent Thomas from using *peccatum* in contexts where he is specifically concerned with civil justice. For example, when Thomas considers the general virtue of legal justice, which is ordered to the political common good, he adds that "in like manner [legal] injustice may be called a general sin."³⁷

For Thomas, fault is the broader term, including both evil habits (vices) as well as evil acts (sins). Evil habits come to be through the action of the agent, but are not acts themselves. Sin, on the other hand, denotes an act, and never merely a disposition or habit.³⁸ Both, however, are voluntary. For vice, as well as sin, is an evil in an intellectual nature that is according to the will and pertains to acting (in that it is produced by acts of the will). While an evil habit may also have the aspect of punishment and involuntariness,

³³ "Peccatum enim communiter dictum, secundum quod in rebus naturalibus et artificialibus invenitur, ex eo provenit quod aliquis in agendo non attingit ad finem propter quem agit; quod contingit ex defectu activi principii; sicut si grammaticus non recte scribat, contingit ex defectu artis, si tamen recte scribere intendit; et quod natura peccet in formatione animalis, sicut contingit in partibus monstruosis." *De Malo*, q. 3, a. 1. See also *S.C.G.* III, c. 2, n. 7.

³⁴ *De Malo*, q. 3, a. 1: "Quod voluntas deficit a debito fine per hoc, quod in finem indebitum tendit."

³⁵ *S.T.* I-II, q. 71, aa. 1, 4.

³⁶ *S.T.* I-II, q. 71, a. 6. The two definitions are not opposed: the eternal law is the source of the order which is violated by disordered acts, and so every disordered act is an offense against God.

³⁷ *S.T.* II-II, q. 58, a. 5, ad 3: "et eadem ratione iniustitia potest dici peccatum commune."

³⁸ See *S.T.* I-II, q. 71, a. 5, which addresses the question of sins of omission. Even sins of omission that do not include some act in their essence (to will not to do something one ought) still include an act in their cause. For if there is no act of the agent which can be pointed to as cause of the omission, then the omission is not voluntary and therefore not a sin.

as noted above, its origin is in action and is voluntary. Thomas contrasts punishment with fault, which is an evil in an intellectual nature that is according to the will and consists in acting.³⁹ But he says that punishment is due specifically to sin, as we will see below.

The distinction between first and second act helps explain why faults are more properly called evils. First, the greater evil is that which is opposed to the greater good. Punishment is a privation of the first act; fault of the second. The second act is a greater good than the first. Therefore, the evil of fault is a greater evil than the evil of punishment.⁴⁰ For example, it is an evil of punishment for a man to be born blind (a privation in the first act, by which the form informs the matter). It is an evil of fault for a man to have sight but to use it for an act of lust.

Second, fault makes the agent evil while punishment does not. Punishment deprives the agent of something he may use for good or for evil, but it does not make him evil. Fault is an evil in the agent's voluntary action, a disordered act of the will. Good acts make the will good, since good absolutely is in acts rather than in potencies, and similarly, evil acts (faults) make the will evil.⁴¹ A man is called good or evil (as a man) insofar as his will is good or evil, so fault, which makes the will evil, makes the man evil. Thus, fault has more of the nature of evil than punishment.

We have seen in this section what Thomas means when he says that punishment is an evil. He treats punishment in conjunction with fault, distinguishing between these two

³⁹ "Fault is in acting, punishment in suffering" (culpa est in agendo, poena vero in patiendo). *De Malo* q. 1, a. 4. "The evil that consists in the removal of a due operation in voluntary things has the nature of fault" (Malum autem quod consistit in subtractione debitae operationis in rebus voluntariis, habet rationem culpa). *S.T.* I, q. 48, a. 5.

⁴⁰ *De Malo*, q. 1, a. 5.

⁴¹ *S.T.* I, q. 48, a. 6.

forms of evil in an intellectual nature. Evil in general is a privation of some good. Fault is an evil in an intellectual nature that is according to the will and done by an agent; punishment is an evil suffered by an agent, contrary to his will, on account of some fault. Fault, evil in the agent's will, is evil simply, while punishment, the loss of some form or perfection in the agent, is evil in a certain respect. It is possible to affirm that punishment, because it deprives an agent of some good, is an evil. Yet evil is only fault when it is a privation in the will. Punishment does not entail the privation of a good that makes a man bad by not having it. Yet the distinction between fault and punishment does not dispel Sher's "air of paradox." Punishment is not evil in the will of one who suffers it, but it could still be evil in the will of one who inflicts it. We need to see, then, how Thomas claims that the act of punishing is a good act.

B Punishment is Good Simply

We have seen that for Thomas, punishment is not evil simply. Rather, he will say that punishment is good simply; that is, to punish is (or at least can be) a good act:

Punishment as it is compared to the subject is evil inasmuch as it deprives the subject in some way; but according as it is compared to the agent who inflicts the punishment, it sometimes has the nature of good, when the one who inflicts the punishment does so for the sake of justice.⁴²

In this section, we will consider what makes an act of punishment a good act. While the treatise on justice in the *Summa Theologiae* contains no question specifically addressing the act of punishing, we may gather a coherent account of it from questions on

⁴² *De Malo*, q. 1, a. 4, ad 9.

commutative justice, judgment, and vengeance. First, however, we need to be clear about what makes a human act in general to be a good act, in Thomas's view.

B.1. Human Acts

In setting out the basics of Aquinas's theory of human acts, it is not my purpose to prove the correctness of his view. I do think, however, that the theory is a reasonable and illuminating way of talking about human acts, qualities that appear most readily when the theory is applied to specific human acts. One of the strengths of the theory is that it is able to account for commonly-held moral differences, such as the difference between acts of punishment and other harmful acts. If the theory does help illuminate acts of punishment, it provides significant, though partial reason for affirming this view.

Human acts are voluntary acts, which is to say that they "proceed from a deliberate will."⁴³ Human acts vary in their degree of voluntariness, but a purely involuntary act is not a human act. The digestion of food, for example, though the act of a human, is not subject to the will (not voluntary), and therefore not a human act. Voluntary acts are distinguished by two characteristics: their principle is within the agent, and they are intended by the agent. The principle of a voluntary act is within the agent himself, which distinguishes voluntary acts from acts caused by force. If someone grabs my arm and uses it to hit another, this is not a voluntary act.⁴⁴ Voluntary acts are intentional acts, which distinguishes them from acts caused by ignorance.⁴⁵ If a man dies

⁴³ S.T. I-II, q. 1, a. 1.

⁴⁴ Aristotle *Ethics* III.1.1111a23.

⁴⁵ S.T. II-II, q. 43, a. 3.

from eating a poisonous plant, not knowing it to be poisonous, his self-destruction is involuntary, because it is caused by ignorance.

The will performs a number of different acts; the ones most important to the moral analysis of an act are volition, choice, and intention. Volition (*voluntas*), which is willing in the strict sense, is the interior act of the will, by which the will is moved to an end. The end, the term of an act of volition, is that which is willed for its own sake. In the act of volition, the will is moved to the end as its object, without implying a movement to the means necessary to attain that end.⁴⁶

Choice (*electio*) is the act of the will in respect of means. As Aristotle says, “We wish for the end more [than for the things that promote it], but we decide on things that promote the end.”⁴⁷ In order to achieve the end, the will deliberates about possible means, and chooses among those means. One wills the means, insofar as the means are directed to the end.⁴⁸ The means are the term of the act of choosing. There is a one-way dependence in the relationship of the will to ends and means: the willing of the means is dependent on the willing of the end, but not vice versa. The will is only moved to the means on account of some end, but the end can be willed without willing the means.

In volition, the end is willed absolutely, and in choice, the means are willed for the sake of the end. There is another movement of the will, which accompanies an exterior act. In this act, means and end are willed by one movement of the will. The end is the reason for willing the means, or “the term [end] towards which something [some

⁴⁶ *S.T.* I-II, q. 8, a. 2.

⁴⁷ *Ethics* III.2.1111b27.

⁴⁸ *S.T.* I-II, q. 8, a. 2.

means] is ordained.”⁴⁹ The act by which one wills the end as a reason for willing the means is called “intention” (*intentio*).⁵⁰ In the act of intention, the will is not moved to the end alone, but in a single movement, it wills the end and the means. The *end willed as a reason for willing the means*, which Thomas calls the object of the act, is the term of the act of intending.⁵¹

The *object* of a human act, therefore, is more than simply the physical description of the act, though it includes or presupposes the physical description. A human act has a *natural species*, which is the bare physical description of the act.⁵² But a human act is also intentional, and its intentionality (how the physical act is directed by the agent to some end) gives the act its *moral species*. The object answers the question, ‘what are you doing?’

Now, for any given act, there is more than one possible answer to the question, ‘what are you doing?’ For example, one may ask a man walking down the street what he is doing. His answer could be, ‘I’m walking down the street,’ but most likely, this bare physical description would leave the asker unsatisfied. He was not looking for the natural species of the act, the bare physical description of his activity, (that was already known). He seeks the intentionality of the act: what is he doing walking down the street? The answer to this question is the moral species, which presupposes the natural species, but also gives an account of the intentionality of the act. A more satisfactory answer in our

⁴⁹ *S.T.* I-II, q. 12, a. 1, ad 4.

⁵⁰ *S.T.* I-II, q. 12, a. 4: “The end, considered as a thing, and the means to that end, are distinct objects of the will. But in so far as the end is the formal object in willing the means, they are one and the same object.”

⁵¹ Thomas Cavanaugh describes the term of an act of intention as an “end-via-means” composite, in order to emphasize the idea that the object of an act includes both end and means. “Double Effect Reasoning: A Critique and Defense,” 31.

⁵² *S.T.* I-II, q. 1, a. 3, ad 3.

example might be ‘I’m going to church.’ This reveals the intentionality and therefore the moral character of the act.

But now we must introduce another feature of human acts. All human acts have an object, which is the term of the act of intention, what the agent actually proposes to do. But the object, the end willed as reason for willing the means, may itself be the means to some further end. This further end is what the agent really wants, his reason for performing the act, which is commonly called his end. To distinguish between end as part of the object and end as what the agent wants to achieve through the object, I will refer to the end that is willed in intending the object as the *proximate end*, and the end for which the object is a means as the *remote end*.⁵³ Thus, we find that two acts identical in object may have different remote ends. For example, giving alms to aid a person in need and giving alms to incite another to envy are acts with the same external description, but with different ends. In our previous example, the walker’s response might have been, ‘I’m trying to please my mother,’ i.e., by going to church. Thus, what was first perceived as an act of worship now appears as an act of filial piety. This new information does not negate the previous description, ‘going to church,’ but it shows that the proximate end contained in that description is itself directed to another, remote, end. The difference between the remote and the proximate end is that the latter is achieved *in* the performance of the act, and the former is achieved *by means of* the act. The proximate end cannot be separated

⁵³ S.T. I-II, q. 1, a. 3, ad 3: “One and the same act, in so far as it proceeds once from the agent, is ordained to but one proximate end, from which it has its species: but it can be ordained to several remote ends, of which one is the end of the other.”

from the object (for example, one cannot separate the end of death from the act of running someone through with a sword).

We have considered three acts of the will: volition, choice, and intention. Volition is the interior act of the will, whose term is the end. Choice is the act by which the means are willed. Intention is the willing of the end as reason for willing the means. The term of an act of intention is the object, and it is the object that gives the act its moral species. But we must also keep in mind that the end included in the object (the proximate end) may be directed by the will to another (remote) end. This will be essential as we go on to consider the source of goodness in human acts in the next section.

B.2. Good and Evil in Human Acts

The intended object determines the moral species of the act, which is the primary element in the goodness of the act. Yet the object is not the only thing relevant to the goodness of an act. In fact, Thomas describes a fourfold goodness in human action:

First, that which, as an action, it derives from its *genus*; because as much as it has of action and being so much has it of goodness.... Secondly, it has goodness according to its *species*; which is derived from its suitable object. Thirdly, it has goodness from its *circumstances*, in respect, as it were, of its accidents. Fourthly, it has goodness from its *end*, to which it is compared as to the cause of its goodness.⁵⁴

In order to be good simply, an action must be good in its genus, species, circumstances, and end, but “the primary goodness of a moral action is derived from its suitable

⁵⁴ S.T. I-II, q. 18, a. 4 (emphasis mine). Note that Thomas does not mention the *means* as one of the sources of the goodness of a human act, since the means, as seen above, are included in the object of the act.

object.”⁵⁵ All human acts are good in their genus; that is, good insofar as they are acts, and so genus is not a source of moral goodness.⁵⁶ The object of an act determines the species, which is the primary source of the goodness (or evil) of the act. Again, the moral species of an act is distinct from the natural species. Two acts may be of the same natural species, but different moral species, and two acts may be of different natural species, but the same moral species (e.g., two acts of eating have the same natural species, but different moral species: one is an act of nourishment and one is an act of gluttony).⁵⁷

The end and the circumstances must also be good, if a human act is to be good. Here the end means the remote end, which we considered above. Thomas describes the circumstances in the following way:

[T]he word “circumstance” has passed from located things to human acts. Now in things located, that is said to surround something, which is outside it, but touches it, or is placed near it. Accordingly, whatever conditions are outside the substance of an act, and yet in some way touch the human act, are called circumstances. Now what is outside a thing’s substance, while it belongs to that thing, is called its accident. Wherefore the circumstances of human acts should be called their accidents.⁵⁸

Since “it is evident that a thing derives its species from that which is essential and not from that which is accidental: because what is accidental is outside the specific nature,” it appears that circumstances do not affect the species of an act.⁵⁹ It is true that circumstances do not change the substance of an act, but some circumstances bear moral

⁵⁵ *S.T.* I-II, q. 18, a. 2.

⁵⁶ *S.T.* I-II, q. 18, a. 4, ad 3.

⁵⁷ “Contingit autem aliquos actus dupliciter considerari: vel secundum speciem naturae, vel secundum speciem moris: et quandoque conveniunt secundum speciem quantum ad unum dictorum, et differunt secundum aliud” (But it happens that some acts are to be considered in two ways: either according to natural species, or according to moral species: and sometimes things agree according to [one] species so much as they are said to be one, and differ in another way). *Super Sent.* III, dist. 23 q. 3 a. 1 qc. 3 co.

⁵⁸ *S.T.* I-II, q. 7, a. 1.

⁵⁹ *S.T.* I-II, q. 72, a. 1.

relevance. The natural species (which seems to be what Thomas means by the ‘substance of an act’’) is not affected by when it is done or by whom. But the moral species may be affected by such accidents. In this way, that which we call an accident when considering the act as a substance, if it has a special relation to reason, may be included in the essence of the act:

Just as the species of natural things are constituted by their natural forms, so the species of moral actions are constituted by forms as conceived by the reason.... And consequently that which, in one action, is taken as a circumstance added to the object that specifies the action, can again be taken by the directing reason, as the principal condition of the object that determines the action’s species. Thus to appropriate another’s property is specified by reason of the property being “another’s,” and in this respect it is placed in the species of theft; and if we consider that action also in its bearing on place or time, then this will be an additional circumstance. But since the reason can direct as to place, time, and the like, it may happen that the condition as to place, in relation to the object, is considered as being in disaccord with reason: for instance, reason forbids damage to be done to a holy place. Consequently to steal from a holy place has an additional repugnance to the order of reason. And thus place, which was first of all considered as a circumstance, is considered here as the principal condition of the object, and as itself repugnant to reason. *And in this way, whenever a circumstance has a special relation to reason, either for or against, it must needs specify the moral action whether good or bad.*⁶⁰

In natural substances, the natural form gives a specific difference, and the accidents are things that lie outside of this form. In human acts, an act that was first placed in a certain species may be reevaluated in light of additional information. A new form may be presented to the reason, which causes reason to place the act in a different species. How do we know when we have reached the end of this process? Can reason ever determine the moral species of a particular act, given the unlimited number of circumstances that it might consider?

⁶⁰ S.T. I-II, q. 18, a. 10. Emphasis mine.

Thomas reassures us on this count, saying that we need not consider “accidents which are altogether accidental,” but only those accidents, which while “they are extrinsic to the act, nevertheless are in a kind of contact with it, by being related to it.”⁶¹ Only circumstances that have a “special relation to reason” (but all things that have such a relation) need to be considered in specifying an action. These are the answers to the questions put by Aristotle: “who is doing it, what he is doing, about what or to what he is doing it, sometimes also what he is doing it with—with what instrument, for example; for what result, for example, safety; in what way, for example, gently or hard.”⁶² Other circumstances, such as what the weather was like, or height of the ceiling, or the number of buttons on the victim’s shirt, except perhaps by some relation to one of the primary circumstances (they may help us determine who did it, or when, or why). Of themselves, such circumstances bear no relation to the morality of the act. So it is not necessary to consider every circumstance before determining the species of a particular act, and therefore the goodness of the act.

Determining which circumstances touch the essence of the action is an exercise of practical reason. It is not possible to say in general that all circumstances of place are relevant to the morality of an action. While the circumstance of place may be relevant, as in Thomas’s example of stealing from a holy place (which specifies the act as sacrilege), the fact that a murder occurs in the attic and not the basement of a house does not have a similar effect. This applies as well to the other circumstances; sometimes they will be relevant to the moral analysis of an action, and sometimes they will not. The only way to

⁶¹ *S.T.* I-II, q. 7, a. 2, ad 2.

⁶² *Ethics* III.1.1111a5-6.

know is to actually analyze specific actions. If, in regard to a particular action, reason has something to say about when the action is done, or to whom, or by whom, then these circumstances need to be considered in the moral analysis of the act. If reason makes no determination about these circumstances, then they do not need to be considered in the moral analysis of the act.

In summary, the object of a human act determines its moral species and so makes it a good (or evil) act in itself. The end for which the act is performed (the remote end) and the due circumstances further determine the goodness of a human act. In order for a human act to be a good act, its object must be good, its end must be good, and its due circumstances must not be lacking.

B.3. The Object of an Act of Punishment

To ask what makes an act of punishment a good act, the question we are considering in this section, is to ask what the object of an act of punishment is, for the object determines the moral species of a human act. The object is what the agent is doing, not only the physical description of the act, but that act precisely as done by a rational agent; i.e. intentionally. Thus the object includes the (proximate) end and the means willed for that end. For example, consider the man making a loaf of bread. Making bread is an accurate shorthand description of the object of the act, including the proximate end (the loaf of bread) and the means (everything included under the verb “making”): collecting ingredients, measuring, mixing, kneading, waiting for the dough to rise,

baking).⁶³ The object of the act does not include possible remote ends, which cause the agent to act. For example, the man may be baking a loaf of bread to feed his son: the remote end. A more detailed discussion of Thomas's view of human acts is found in Chapter II. Thomas describes punishment as an act of *vindicatio*, which belongs to the virtue of justice, and its object as the restoration of order through the infliction of an evil on the offender (i.e., by depriving him of some good). To see what he means by restoring order, we need to look at the virtue of justice.

Justice is the cardinal virtue that directs man in his relations with others, the virtue that “renders man’s operations good.”⁶⁴ The end of an act of justice is the just or the right, which is a kind of equality. The act of justice is to render to each one what is his own, and “each man’s own is that which is due to him according to equality of proportion.”⁶⁵ The proper matter of the virtue of justice is those things that have to do with the relations between men.⁶⁶ The just or the right in relations between men is a kind of equality: an equality of order. This equality is not absolute but proportional. That is, justice does not require that all men receive the same, but that each receives equal to his merit (what he is, what he has done, or what he has been promised).

There are two kinds of order within the community, and correspondingly, there are two kinds of justice. One is the order of whole to parts, and this is directed by distributive justice, which has to do with the distribution of common goods to the

⁶³ In another sense, the means could be the instruments used to make the bread: bowl, spoon, oven, etc. These are circumstances of the act, whereas here we are considering the means in the agent’s activity.

⁶⁴ *S.T.* II-II, q. 58, a. 3. See also *Ethics*, V.3, 4; which Thomas’s account of justice follows closely.

⁶⁵ *S.T.* II-II, q. 58, a. 11.

⁶⁶ *S.T.* II-II, q. 58, a. 1.

members of the community.⁶⁷ The other order is that of part to part, and this is directed by commutative justice, which has to do with the relations between persons.⁶⁸ Equality is achieved in different ways in the two types of justice, distributive and commutative. Distributive justice aims at a geometrical proportion, such that goods are distributed justly when each receives in proportion to his possession of the relevant kind of merit or quality.⁶⁹ So, for example, if suffrage is one of the goods distributed by society, and the single “merit” that obtains this good is having reached the age of eighteen, then all eighteen-year-olds should receive the benefit of suffrage.

Commutative or rectificatory justice has to do with the relation of part to part, rather than part to whole. It reestablishes an order which has been upset (the term “rectificatory” captures the idea that this kind of justice makes right something that is not right, that is out of proportion).

[I]n commutations something is paid to an individual on account of something of his that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily. Hence it is necessary to equalize thing with thing, so that the one person should pay back to the other just so much as he has become richer out of that which belonged to the other. The result of this will be equality according to the *arithmetical mean* which is gauged according to equal excess in quantity.⁷⁰

⁶⁷ The question of the community as a whole, and of persons as parts of the community, will be taken up in Chapter III of this thesis.

⁶⁸ *S.T.* II-II, q. 61, a. 1.

⁶⁹ “Consequently in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community.... Hence the Philosopher says (*Ethic.* v, 3, 4) that the mean in the latter case [of distributive justice] follows *geometrical proportion*, wherein equality depends not on quantity but on proportion.” *S.T.* II-II, q. 61, a. 2.

⁷⁰ *S.T.* II-II, q. 61, a. 2. See also *Ethics* V.4.

For example, if a buyer and seller agree upon a certain price, the buyer is obliged to produce the good for that price and the seller is obliged to pay that price for the good.

This is an example of voluntary exchange.

In the case of voluntary commutations, the just is clear; the debtor has rendered to the lender his due when he has paid back the loan in full, with any agreed upon interest.

This idea can be extended easily to some involuntary exchanges, such as theft:

rectificatory justice clearly requires a restitution of what was taken. Other crimes,

however, are not so easily understood in terms of exchange and restitution. Yet Aristotle

and Thomas both use the idea of exchange of goods as a model for punishment in

general. By understanding the terms used in voluntary exchange (profit and loss) in a

broad sense, we can extend the idea of rendering a man his own to acts that do not

involve the transfer of material things.⁷¹ Aristotle describes (the special vice of) injustice

as a kind of overreaching, who grasps at goods:

Since the unjust person is an overreacher, he will be concerned with goods—not with all goods, but only with those involved in good and bad fortune, goods which are, [considered] without qualification, always good, but for this or that person not always good.⁷²

One man takes more than his due, whether of money, honors, power, or something else,

or else he deprives another what is the other's due, such as his reputation, his bodily

integrity, or his life. When one man has harmed another, the offender has profited in

some way, while the victim has sustained a loss.⁷³

⁷¹ *Ethics*, V.4; *S.T.* II-II, q. 58, q. 11, ad 3.

⁷² *Ethics* V.1.1129b2-4.

⁷³ Even in cases where restitution is made, there may be an additional punishment. For “when a man takes another's thing unjustly, two things must be considered. One is the inequality on the part of the thing,” and

Punishment addresses the inequality that someone's overreaching has produced, and "by means of punishment the equality of justice is restored, in so far as he who by sinning has exceeded in following his own will suffers something that is contrary to this will."⁷⁴ Is there a common measure between crimes and punishments, as money is for voluntary exchanges, which can be used to determine what punishment is due for an offense? If not, how does the concept of equality apply here at all? Aristotle rejects the idea of a strict reciprocity, "[f]or in many cases reciprocity conflicts [with rectificatory justice]."⁷⁵ Rather, he says, rectificatory justice aims at what is proportionate. In voluntary exchanges, money is the means of achieving proportionality between unlike things. But to achieve proportionality between crimes and punishments, there does not seem to be such a measure. Perhaps this is because punishment responds to an exchange that has already taken place. The offender has taken something and the victim has lost something. Punishment seeks to reverse the involuntary exchange that has already taken place. Thus, Aristotle says, the judge subtracts from the offender's profit and restores the victim's loss.⁷⁶

In the case of bodily injury, it is not in the judge's power simply to restore what was lost by the victim, but he may further this goal, for example by forcing the offender to pay the victim's medical expenses. In the case of murder, one might object, it is impossible to speak of restoring equality between offender and victim. However, the crime has also taken something from the community, so that one can speak of

this is the matter for restitution; the other is the injustice that has been committed, for which "the remedy is applied by punishment." *S.T.* II-II, q. 62, a. 3.

⁷⁴ *S.T.* II-II, q. 108, a. 4.

⁷⁵ *Ethics* V.5.1132b27.

⁷⁶ *Ethics* V.4.1132a10.

rectification between the offender and the community. In the clan or tribe system, the death is a loss to a family group, and that family seeks rectification by killing a member or members of the offending family group. There is also a history of families accepting monetary or other compensation in place of blood vengeance.⁷⁷

The first step toward the rectification of an order that has been disturbed by sin is the identification of the guilty party. This pertains to the act of judgment, which in its original meaning is the proper act of justice, though it can be used more broadly to mean a right decision in any matter.⁷⁸ The act of judgment, properly speaking, is about relations between men, and for it three things are necessary: “first, that it proceed from the inclination of justice; secondly, that it come from one who is in authority; thirdly, that it be pronounced according to the right ruling of prudence.”⁷⁹ In other words, judgment cannot be motivated by hatred, it cannot be a matter of the will of the individual, and it cannot be made rashly or made in the face of serious doubt. Judgment of a particular act as unlawful is necessary for restoring order, but it is not sufficient.

The reason why judgment alone is insufficient is that “punishment is due to sin” (*poena debetur peccato*).⁸⁰ Although this principle is found in the *sed contra* of q. 108, a.4, no particular authority is cited. Thomas seems to be citing the authority of a pre-theoretical, universally held principle—a natural law precept, in other words. The same principle appears in *De Malo*, in the question on original sin: “Now clearly sin, as we are

⁷⁷ This is prohibited in Mosaic Law, which prescribes death for crimes of murder. No compensation is acceptable. Exod. 21:12.

⁷⁸ “The word ‘judgment,’ from its original meaning of a right decision about what is just, has been extended to signify a right decision in any matter whether speculative or practical.” *S.T. II-II*, q. 60, a. 1, ad 1.

⁷⁹ *S.T. II-II*, q. 60, a. 2.

⁸⁰ *S.T. II-II*, q. 108, a. 4, s.c.

now speaking of sin, is that to which punishment is due.”⁸¹ Yet how is something “due” to sin? Or, to put the question in another way, how does punishment effect order?

Thomas appeals to natural forces for a comparison:

It has passed from natural things to human affairs that whenever one thing rises up against another, it suffers some detriment therefrom. For we observe in natural things that when one contrary supervenes, the other acts with greater energy, for which reason *hot water freezes more rapidly*, as stated in *Meteor.* i, 12. Wherefore we find that the natural inclination of man is to repress those who rise up against him. Now it is evident that all things contained in an order, are, in a manner, one, in relation to the principle of that order. Consequently, whatever rises up against an order, is put down by that order or by the principle thereof. And because sin is an inordinate act, it is evident that whoever sins, commits an offense against an order: wherefore he is put down, in consequence, by that same order, which repression is punishment.⁸²

Unfortunately, the example taken from Aristotle’s *Meteorologics* is not particularly helpful. We need not accept Aristotle’s explanation of this phenomenon in order to accept the general principle, “whatever rises up against an order is put down by that order.” Yet the idea of a civil order is still vague. What is the civil order that and how does one “rise up” against it, and how does punishing “put down” one who has risen up against it?

It is clear that for Thomas this order has to do with justice. We will see in Chapter III how he describes the political common good as a just order. Order exists in a human community when the individual members of the community act in right relation to one another and to the whole, in other words, when they act justly (to draw on an Aristotelian distinction, it does not imply they all have the virtue of justice, but that they act in accord with justice). Thomas takes this phenomenon to be evident in human affairs: the more a

⁸¹ *De Malo* q. 4, a. 5. We should note that Thomas says that punishment is due to sin, and not to fault simply; it is due to evil acts, and not to evil dispositions.

⁸² *S.T.* I-II, q. 87, a. 1. See also *S.C.G.* III, c. 140, n. 5.

particular offence threatens the civil order, the more severely it tends to be punished. The object is ordering/equalizing what is disordered/unequal (proximate end) through depriving the offender of some good (means). The remote ends include deterring others from committing crimes, protecting innocent persons from future attacks by the offender, etc.

There is another component we must add to Thomas's view of punishment. We have seen that punishment orders: the descriptive element, but there is also a need to punish: a prescriptive element. The reaction against an evil act is not a necessary reaction, as it is in the hot water example. There is a "natural inclination" for men to repress evil with punishment, which Thomas calls vindication, but this inclination does not automatically produce an act of vengeance. Thomas takes the inclination itself to be an obvious feature of human nature: all men have a sense that evil acts should be punished. And the worse the offense, the more severely they think it ought to be punished.⁸³ This sense is subject to many limits, as Thomas's treatment of vengeance will show, but the limits presuppose that there is an underlying inclination, and that this inclination is natural and good.

Vengeance is one of the virtues annexed to justice. A virtue annexed to a principal virtue is one that has something in common with it, but in some way falls short of the

⁸³ In any society, there may be disagreement about the severity of a particular offense, or even whether something is an offense or not. However, if in some society an offense (such as murder) is generally perceived as worse than another offense (such as theft), then it will tend to be punished more severely. Aquinas gives some illustrations in his treatment of the judicial precepts of the Mosaic Law. (*S.T.* I-II, q. 104)

perfection of the virtue.⁸⁴ Vengeance has in common with justice the fact that it relates one person to another, but it falls short of giving the moral due in that it fails fully to repay the person for what he has done.⁸⁵ It may surprise the modern reader to find vengeance described as a virtue in the *Treatise on Justice* (*S.T.* II-II, q. 108), since we often use vengeance to describe a desire for revenge that arises from malice or envy. This is not what Thomas means, of course. The virtue of vengeance is the perfection of the natural inclination, the inclination to remove harm, which is also called vengeance.⁸⁶ The natural inclination of vengeance directs us to avenge harms already inflicted, “with the intention, not of harming, but of removing the harm done.”⁸⁷ The natural inclination is the foundation for the virtue, but not yet the virtue. Left to itself, a natural inclination tends to exceed or fall short of the mean. In the case of vengeance, the natural tendency is toward the excess of brutality or cruelty, rather than toward the deficiency of remissness in punishing. When the inclination is directed by reason, however, it achieves the mean, which “consists in observing the due measure of [the natural inclination of] vengeance with regard to all the circumstances.”⁸⁸

The object of an act of vengeance, the object of punishment, is the restoration of order (or equality) through depriving the offender of some good (which is the same as to

⁸⁴ See *S.T.* II-II, q. 80, q. 1.

⁸⁵ *S.T.* II-II, q. 80, a. 1. In this question, Thomas considers the virtue as it pertains to individual men and not to public authorities, for “the revenge taken by authority of a public power, in accordance with a judge’s sentence, belongs to commutative justice: whereas the revenge which a man takes on his own initiative, though not against the law, or which a man seeks to obtain from a judge, belongs to the virtue annexed to justice,” i.e., to vengeance. The disposition, however, is the same, for both private and public vengeance seek the redress of a wrong.

⁸⁶ Aquinas attributes a divine origin to the existence of natural inclinations, such as vengeance: “The proper inclination consequent to nature, or to the particular apprehension of some particular thing, comes to a thing from God as its efficient cause.” *S.T.* I-II, q. 19, a. 10.

⁸⁷ *S.T.* II-II, q. 108, a. 2.

⁸⁸ *Ibid.*

say, the infliction of an evil). Order is the proximate end of an act of punishment, since order is achieved in the act of punishment itself. Punishment achieves the good of order by eliminating (or at least limiting) the disorder produced by an offense. Punishment may also serve a number of remote ends, which affect the moral goodness of the act.

Accordingly, in the matter of vengeance, we must consider the mind of the avenger. For if his intention is directed chiefly to the evil of the person on whom he takes vengeance and rests there, then his vengeance is altogether unlawful: because to take pleasure in another's evil belongs to hatred, which is contrary to the charity whereby we are bound to love all men....

If, however, the avenger's intention be directed chiefly to some good, to be obtained by means of the punishment of the person who has sinned (for instance that the sinner may amend, or at least that he may be restrained and others be not disturbed, that justice may be upheld, and God honored), then vengeance may be lawful, provided other due circumstances be observed.⁸⁹

If the avenger wills the amendment of the sinner, his end is good. But a good end does not render an evil act good, and so if vengeance itself is evil, using it for the good of the offender would be evil. Only if the act of vengeance is already specifically good, as it is for Thomas, does it make sense to consider the goodness of its remote ends.

It is possible to overemphasize the idea of something rising against an order and being put down by that order. This is part of Thomas's thought on punishment, but it is not the whole. There are several limitations we should keep in mind. First, the order/disorder talk belongs more to divine punishment than to human punishment, as we will see below. Second, it is always individuals, whether representing the community or not, who actually take vengeance. An order is not an agent. In each individual, the inclination to vengeance seems to arise first as the response to injuries against oneself,

⁸⁹ *S.T.* II-II, q. 108, a. 1.

and later in response to injuries against others. This inclination is extended to violations against an order. Talk of injury against an order and redressing order needs to be supplemented by an account of the limits of temporal punishment and a more concrete discussion of specific vicious acts.

To sum up, punishment for Thomas is a specifically good act, an act of justice. Human acts, Thomas says, fall under different moral species. The morality of a human act is essentially determined by this species, which is determined by the object of the act. The object is the end willed as the reason for willing the means; it is what the agent intends to do. The object of an act of punishment is the restoration of order by depriving the offender of some good. Punishment is an act of *vindicatio*, which belongs to commutative justice, and its object is the restoration of order through the infliction of an evil on the offender (i.e., by depriving him of some good). Justice is the virtue that renders to others what is due, and commutative justice renders what is due from individual to individual. Punishment or vengeance is due to those who have done evil. Vengeance seeks to rectify disorder through “the infliction of a penal evil on one who has sinned.”⁹⁰

B.4. Levels of Order Addressed by Punishment

⁹⁰ S.T. II-II, q. 108, a. 1.

We have seen that for Thomas, the object of punishment is restoring order, but what kind of order does punishment restore? The order achieved in punishing may be one of three distinct orders to which man belongs:

Man can be punished with a threefold punishment corresponding to the three orders to which the human will is subject. In the first place a man's nature is subjected to the order of his own reason; secondly, it is subjected to the order of another man who governs him either in spiritual or in temporal matters, as a member either of the state or of the household; thirdly, it is subjected to the universal order of the Divine government. Now each of these orders is disturbed by sin, for the sinner acts against his reason, and against human and Divine law. Wherefore he incurs a threefold punishment; one, inflicted by himself, viz. remorse of conscience; another, inflicted by man; and a third, inflicted by God.⁹¹

The first punishment to which the human will is subject is an intrinsic punishment, which follows immediately from the wrong act: the act that makes a man deserving of punishment also inflicts the punishment, for in acting against reason and creating disorder within his soul, the wrongdoer inflicts a punishment on himself. This kind of punishment is not directly relevant to civil punishment, since remorse cannot be inflicted by one man on another, but arises from within the one who has done wrong.

Insofar as each evil act is an act against the divine government of the world, it is subject to divine sanction, the third kind of punishment. This kind of punishment is the deprivation of a divine good: the loss of sanctifying grace, and finally the loss of the vision of God. This kind of punishment is also outside the civil arena, though the presence of divine retribution is important for Thomas in considering even human punishment, because it serves as an exemplar, but also because it justifies the limited character of human punishment. The second kind of punishment, however, is our primary

⁹¹ *S.T.* I-II, q. 87, a. 1.

concern; it regards that order by which the wrongdoer is related to his fellow men. This kind of punishment is inflicted by human authority, and according to human laws. Civil punishments fall into this category, as do ecclesiastical punishments such as excommunication. Punishment, then, always redresses disorder, but it does so according to the level of order that was violated, and the corresponding competence of the authority.

In this section, we have been concerned with describing the object of an act of punishment. This object is the redressing of the disorder caused by an offense through the infliction of an evil on the offender. The object of a human act determines its moral species. Punishments are acts of vengeance, which is a virtue annexed to justice. Punishing, therefore, is a specifically good act, because it is an act of the virtue of justice. Punishment redresses disorder, whether disorder in the soul, in the civic community, or in the universe as a whole. The ordering of all things belongs to God, their creator, and it is part of his goodness to leave nothing unordered. But civil authorities, having care over an earthly community, have the power to inflict punishments for offenses against that community. Their punishments are not intended as rectifying the order in the universe as a whole, but in rectifying the civil order.

C Remote Ends of Punishment

Contemporary writers often distinguish four purposes for punishing: rehabilitation, defense or incapacitation of the criminal, deterrence, and retribution.⁹² Thomas also talks about these ends, but for him the end of retribution is an end in a

⁹² See, for example, Van den Haag, *The Death Penalty: A Debate*, 53.

different way than rehabilitation, defense, and deterrence. Retribution is another way of describing the object of punishment: the restoration of order by inflicting an evil on the offender. The act of punishing itself *is* the restoration of order, so the punishment's efficacy as punishment does not depend on some further result. Rehabilitating the offender and preventing other criminal acts (whether by the offender or by others), are on the other hand, what Thomas calls the medicinal ends of punishment.

Medicinal ends are not accomplished in the act of punishing itself, but through the punishment; they are remote ends. Yet like retribution, the medicinal ends of punishment are goods of order. In its penal or retributive quality, a punishment seeks to restore an order that was upset by the offense, by causing the offender to suffer something contrary to his will. In its medicinal quality, punishment seeks the restoration of order, insofar as it aims at reform and the promotion of virtue; it seeks the prevention of disorder, insofar as it aims at deterrence. Therefore, retribution, defense, rehabilitation, and deterrence all participate in some way in the good of order.

A punishment must be retributive in order to be punishment, properly speaking, as Thomas argues in *S.T.* I-II, q. 87. It may be only retributive, or retributive and medicinal. Only eternal punishment is purely retributive, and only eternal punishment is perfectly retributive. Temporal punishments are retributive, but not perfectly and not solely. It is fitting, and even obligatory, that temporal punishments be used to serve medicinal ends. Now if men had no retributive authority, they could not punish at all. But their authority is derivative and limited. God alone has knowledge of what each deserves and has power

to bestow it. Human authorities participate in that divine power, in order that human society may be possible.

C.1. Perfect Retribution: Eternal Punishment

One might wonder why it is necessary to restore order through punishment. Why not just let things remain disordered? The ultimate answer to this, according to Thomas, lies in the goodness of God:

To leave nothing unordered among things pertains to the perfect goodness of God; as a result, we observe that every evil in things of nature is included under the order of something good. So, the corruption of air is the generation of fire and the killing of a sheep is the feeding of a wolf. Hence, since human acts are subject to divine providence, just as things in nature are, the evil which occurs in human acts must be contained under the order of some good. Now, this is most suitably accomplished by the fact that sins are punished. For in that way those acts which exceed the due measure are embraced under the order of justice which reduces to equality.⁹³

God punishes because he is good, Thomas says in this passage from the *Summa Contra Gentiles*. “To leave nothing unordered” is characteristic of God’s goodness. Evil is a disruption of order, a lack of some form that forms a part of the order of the universe. In the natural order, the evil of one creature is the good of another: the air ceases to exist so that fire may be generated; the sheep dies so that the wolf may live. Sins, as disordered human acts, must also be brought into an order, and this is accomplished through punishment. A disordered human act creates an inequality, which punishment removes (*tollitur*). Thus through punishment, God brings good out of evil human acts.

⁹³ S.C.G. III, c. 140, n. 5.

To say that God punishes because he is good is not to say that punishment is good in itself. God wills the order of his justice, of which punishment is a conditionally necessary part. The condition that makes punishment necessary is of course sin. Were there no sin, punishment would not form a part of justice. This indicates that punishment is related to justice in an accidental and not an essential way. Thomas argues that vengeance cannot be unlawful in itself, for “We should look to God for nothing save what is good and lawful. But we are to look to God for vengeance on His enemies: for it is written (Luke 18:7): ‘Will not God revenge His elect who cry to Him day and night?’ as if to say: ‘He will indeed.’ Therefore vengeance is not essentially evil and unlawful.”⁹⁴ Vengeance is not unlawful, but neither is it an end in itself: “God does not delight in punishments for their own sake, but He does delight in the order of His justice, which requires them.”⁹⁵ Again, “God does not will the damnation of a man, considered precisely as damnation, nor a man’s death, considered precisely as death, because, ‘He wills all men to be saved’ (1 Timothy 2:4); but He wills such things under the aspect of justice.”⁹⁶ The object of the divine will is not the punishment itself, but the good of order, which is achieved in punishing.

Yet even if punishment is part of the order of justice, one might object that eternal punishment is unjust. Eternal damnation appears to violate the proportional equality of justice, since eternal damnation is an infinite punishment, and all sins are finite acts.⁹⁷ In

⁹⁴ *S.T.* II-II, q. 108, a. 1.

⁹⁵ *S.T.* I-II, q. 87, a. 3.

⁹⁶ *S.T.* I-II, q. 19, a. 10, ad 2.

⁹⁷ A similar objection could be made against capital punishment: how can any finite crime merit the punishment of death, which is in some sense endless (since final and irrevocable)? This objection can be answered as Thomas answers the current question.

response to this objection, Thomas argues that the eternal duration of punishment is necessary for the order of the universe. An effect remains as long as its cause remains; thus as long as a disorder endures, so does its punishment.⁹⁸

[S]in incurs a debt of punishment through disturbing an order. But the effect remains so long as the cause remains. Wherefore so long as the disturbance of the order remains the debt of punishment must needs remain also. Now disturbance of an order is sometimes reparable, sometimes irreparable: because a defect which destroys the principle is irreparable, whereas if the principle be saved, defects can be repaired by virtue of that principle ... Consequently if a sin destroys the principle of the order whereby man's will is subject to God, the disorder will be such as to be considered in itself, irreparable, although it is possible to repair it by the power of God.⁹⁹

A disturbance of the order of man's will to God is "irreparable" when the principle by which it could be repaired has been removed from man (this is also called a mortal sin). From the human perspective, the disorder is irreparable, but divine action can restore the principle (sanctifying grace) by which it can be repaired. Since God does not force sanctifying grace on a soul, those who reject grace do indeed have an irreparable disorder. But God brings order even out of this; the disorder that can no longer be repaired is made part of a greater order through punishment. If there were no eternal punishment, there would be an eternally unresolved disorder, which would be repugnant to the divine goodness, Thomas says. It would be as if a playwright left his drama without a final scene, failing to bring conflicts to resolution. An eternal disorder, like an unfinished creation, is contrary to the notion of divine providence, for "to leave nothing unordered among things pertains to the perfect goodness of God."¹⁰⁰

⁹⁸ *S.T. I-II*, q. 87, a. 3; a. 4, ad 3.

⁹⁹ *S.T. I-II*, q. 87, a. 3.

¹⁰⁰ *S.C.G. III*, c. 140, n. 5.

Thomas also points out in this article that the proportionality between punishment and offense consists not in duration, but in severity.¹⁰¹ Serious crimes like murder and assault can be committed in a moment, while their punishment may last for years. The punishment is based on the severity of the offense, and the severity of the offense is not determined by its duration, so we should not expect the punishment to be determined by the duration of the offense. Thus, eternal punishment is not opposed to proportionality.

Retribution, then, most properly belongs to God. God punishes because he is good. He does not love punishment, but justice, to which punishment belongs. Given that perfect vengeance is possible only in eternity, one might well question whether temporal, human punishment is legitimate or necessary. In the next section, then, we will consider the specific role of temporal punishment, especially civil punishment.

C.2. Medicinal Retribution: Temporal Punishment

Some object that since only God punishes perfectly, only God should punish. Saint Paul seems to say this when he admonishes the Romans, “Beloved, never avenge yourselves, but leave it to the wrath of God, for it is written, ‘Vengeance is mine, I will repay, says the Lord’ [Deuteronomy 32:35]” (Romans 12:19). Thomas admits that human punishment, and in fact all temporal punishment, is imperfect. To this objection, he replies, “He who takes vengeance on the wicked in keeping with his rank and position does not usurp what belongs to God but makes use of the power granted him by God.”¹⁰² That is, human authorities share in the divine power to punish. Thus, human punishments

¹⁰¹ *S.T. I-II*, q. 87, a. 3, ad 1.

¹⁰² *S.T. II-II*, q. 108, a. 1, ad 1.

are also penal or retributive, we might say by participation. Yet human punishment is always restricted by the limitations of human knowledge and power. Human punishment is imperfect in extent, because it does not punish every sin; and it is imperfect in accuracy, because its judgments are fallible and not exactly proportioned to merit.

First, human punishment is limited in the extent of offenses it treats. Human punishment imitates divine punishment in its limited way. Like the punishments of God, human punishments seek to bring good out of evil, or at least to curb evil. But while God punishes all evils, human law punishes only those that are most grievous and "...from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like."¹⁰³ It belongs to God, as the one who orders the entire universe, to punish all evil acts and to reward all good acts. It belongs to a more limited order, such as the order of a civil state, to punish only offenses against the civil order. This limit on human punishment corresponds to its object, which is not universal order but the order of a particular human community. Second, human punishments are fallible. Even when judging within their competency, human judges are liable to err. Thus in judging others, Thomas maintains that we ought to interpret doubts for the best; we should judge others to be good, unless there is evident proof of wickedness.¹⁰⁴

¹⁰³ *S.T. I-II*, q. 96, a. 2. This article speaks of civil punishments, but its point also applies to ecclesiastical punishments. Church Law does not punish all sins, but only those that are present a serious threat to the good of ecclesial unity.

¹⁰⁴ *S.T. II-II*, q. 60, a. 4. Here we see in Aquinas an early defense of the legal presumption of innocence.

Human punishments, because they do not achieve perfect retribution, are sought for what Thomas calls “medicinal” ends:

the punishments of this life are sought, not for their own sake, because this is not the final time of retribution, but in their character of medicine, conducing either to the amendment of the sinner, or to the good of the commonwealth whose calm is ensured by the punishment of evil-doers.¹⁰⁵

And again in his treatise on evil:

Punishments that are inflicted by God in a future life correspond to the gravity of fault; hence the Apostle says in Romans 2:2, that “the judgment of God is according to truth against those who do such things.” But punishments that are inflicted in the present life either by God or by man do not always correspond to the gravity of fault, for sometimes a lesser fault is punished with a graver punishment temporarily in order that a greater danger be avoided; for punishments in the present life are used as medicines.¹⁰⁶

The fact that temporal punishments “do not always correspond to the gravity of fault” is not a condemnation of temporal punishments.¹⁰⁷ These punishments are imperfect (incomplete) because this world is not “the final time of retribution.”¹⁰⁸ By saying that temporal punishments are sought “in their character of medicine,” Thomas excludes the errors of those who say that human punishment should be concerned *only* or *primarily* with retribution. Punishments in this life are not sought for their own sake, he says; they are not sought simply *as* retribution, but for some other good that may be obtained *through* retribution.

We should note that Thomas does not deny all retributive character to human punishments, but says that these punishments are sought for their medicinal character. All

¹⁰⁵ *S.T.* II-II, q. 68, a. 1. The punishments of eternity are not sought for their own sake, either (see *S.T.* I-II, q. 19, a. 10, ad 2), but they are sought for the order of which they are a part, rather than for some extrinsic end.

¹⁰⁶ *De Malo*, q. 2, a. 10, ad 4.

¹⁰⁷ *De Malo*, q. 2, a. 10, ad 4.

¹⁰⁸ *S.T.* II-II, q. 68, a. 1.

punishments are retributive; retribution simply describes the object of an act of punishment, and if a punishment was not retributive it would not be punishment, properly speaking. In the case of human punishments, the retributive end is also a means toward another (remote) end or ends. For any human act, the object must be good before it can be used to serve another good ends. And so temporal punishments must first be just as punishment before they can be directed to the ends of amending the sinner or protecting the good of the commonwealth. Thus, no act that is objectively evil can be used for its “medicinal” value.

Just because human punishments are sought for their medicinal value does not mean that they will always be lighter than purely retributive punishments. Thomas notes that there is sometimes reason for a human judge to punish *more* severely than is strictly proportional to the crime. Since “the punishments of the present life are medicinal ... when one punishment does not suffice to compel a man, another is added: just as physicians employ several medicines (*medicinae corporales*) when one has no effect.”¹⁰⁹ For example, Thomas describes the punishment for sacrilege in another article:

[T]he fitting punishment of one guilty of sacrilege, since he has done an injury to a sacred thing, is excommunication whereby sacred things are withheld from him. The second point to be considered is utility. For punishments are inflicted as medicines, that men being deterred thereby may desist from sin. Now it would seem that the sacrilegious man, who reverences not sacred things, is not sufficiently deterred from sinning by sacred things being withheld from him, since he has no care for them. Wherefore according to human laws he is sentenced to capital punishment, and according to the statutes of the Church, which does not inflict the death of the body, a pecuniary punishment is inflicted, in order that men may be deterred from sacrilege, at least by temporal punishments.¹¹⁰

¹⁰⁹ *S.T. II-II*, q. 39, a. 4, ad 3.

¹¹⁰ *S.T. II-II*, q. 99, a. 4.

Another example arises in Thomas's discussion of the Mosaic Law. Under this law, the person who stole a single sheep had to restore four sheep to the owner. Strict retribution seems to be satisfied if the offender restores one sheep he stole, but the crime of sheep-theft was a particularly serious threat to social order among the Israelites, since sheep had to graze in open places, making them easy to steal. Because of this affect on the common good, sheep-theft received a greater penalty.¹¹¹

So the fact that human punishments are sought for medicinal ends does not mean that human punishments are always less severe than those sought purely as retribution. Rather, it means that decisions about which evils to punish and how to punish them will be based on either "the amendment of the sinner" or "the good of the commonwealth."¹¹² Since the medicinal effect of punishment is not limited to the one being punished, this characteristic does not rule out even the severest of punishments available to human authority:

Even the punishment that is inflicted according to human laws, is not always intended as a medicine for the one who is punished, but sometimes only for others: thus when a thief is hanged, this is not for his own amendment, but for the sake of others, that at least they may be deterred from crime through fear of the punishment, according to Proverbs 19:25: "The wicked man being scourged, the fool shall be wiser."¹¹³

Capital punishment is not ruled out as a human punishment.

So far we have been considering human punishments as coextensive with temporal punishments, but this is not strictly accurate. All punishments inflicted by man are temporal, but temporal punishments are not all inflicted by man. In several places,

¹¹¹ *S.T. I-II*, q. 105, a. 2, ad 9.

¹¹² *S.T. II-II*, q. 68, a. 1.

¹¹³ *S.T. I-II*, q. 87, a. 3, ad 2.

Thomas discusses the divine infliction of temporal, medicinal punishments. In fact, God is able to inflict medicinal punishments in a perfect way, because of his omniscience.¹¹⁴ He knows whether any particular medicinal punishment will restrict evil or promote good. Therefore, he is able to punish in each case with perfect justice. If he chooses not to punish because this will produce more good than punishing will produce, this too is just, for the good to be produced by not punishing (right order between man and God) is the same good at which punishment aims. God's eternal punishments are primarily and characteristically penal or retributive; these are punishments in the most proper sense, because their purpose is to take what is disordered and make it subject to a greater order. Those suffering eternal punishment cannot be converted, they are no longer a threat to others, and since their identity and punishment is hidden from us, their punishments cannot directly deter others from evil.¹¹⁵ Thus eternal punishments are "not medicinal, but a result of spiritual condemnation."¹¹⁶

In conclusion, Thomas maintains that human punishment (and temporal punishment in general) has both a retributive, or penal end, and a medicinal end: it is penal insofar as it deprives an evildoer of some good, and it is medicinal insofar as it seeks some extrinsic end such as the future safety of innocent members of society. All punishments are retributive, but only eternal punishment is perfectly retributive. The retributive object of human punishments is directed toward a further (medicinal) end, such as the individual good of the evildoer, or the common good of the society.

¹¹⁴ *S.T.* II-II, q. 108, a. 4, ad 2.

¹¹⁵ Eternal punishment may have a temporal medicinal effect, in that it may deter men on earth from evil, but this is not its defining characteristic. *S.T.* I-II, q. 87, a. 3, ad 2.

¹¹⁶ *S.T.* II-II, q. 108, a. 4.

D Conclusion

In closing this chapter, it may be helpful to summarize Thomas's doctrine of punishment in a short list of propositions, which will carry over into our examination of his treatment of the penalty of death in the next chapter.

1. Punishment is an evil suffered by an agent, contrary to his will, on account of some fault.
2. Punishment is evil in a certain respect (to the one who suffers it), but good simply (as an act of justice).
3. Punishment is due to disordered human acts (sins).
4. The object of punishment is the restoration of order through depriving the offender of some good (also called retribution).
5. Perfect retribution is achieved in eternal punishment, given by God, who orders all things in the universe.
6. Human punishment is imperfect retribution because it does not punish all sins, and because it does not punish sins with perfect proportionality.
7. Human punishment is sought as medicine, i.e., for remote ends to be achieved through (imperfect) retribution.

It is only because punishment is understood as an evil suffered by an agent (#1), and not an evil done by an agent, that punishment can be understood as good simply (#2).

Punishment is part of justice because it supplies what is due (order) to disordered acts (#3). Punishment does this by depriving the offender of a good (#4). Only divine punishment, and for that matter, only the divine punishment inflicted in eternity, can punish perfectly by punishing all sins in exact proportion to desert (#5, 6). Therefore, human punishments, besides seeking to restore order, are directed to further ends, which Thomas calls medicinal (#7). When determining temporal punishments for those under its power, civil authorities are obliged to consider not only what punishment is proportional to the offense, but how punishments may harm or benefit the common good.

Given our concern with a specific civil punishment, the death penalty, it may be surprising how often the account so far has referred to divine judgment. This is not accidental, because for Thomas, the justification for civil punishment is founded on the existence of divine punishment. It is only by a share in God's authority over the world, which includes the power to punish, that one man can have the authority to punish another. Thus, Thomas's account of punishment depends on the acceptance of #5, the existence of a perfect, divine retribution. In this context, it is not surprising that temporal punishments provide only imperfect retribution, and that they are desirable for other ends. As a temporal creature, man himself is always incomplete and subject to change until his death. Aristotle notes in Book I of the *Ethics* that we cannot truly pronounce a man blessed unless his activity in accord with virtue spans a complete life, but no one's life is complete until it is over. Since full judgment on a man's life is impossible while he is *in statu viae*, so too are perfect punishment and reward impossible on earth.

Chapter II: The Act and the Institution of Capital Punishment According to St. Thomas

A The Act of Capital Punishment

If human punishments must serve a medicinal end, as we saw in Chapter I, capital punishment seems to be ruled out, since it would be like killing the patient instead of trying to cure him. But in fact, Thomas defends CP precisely on medicinal grounds. For punishment is not always intended as medicine for an individual offender; sometimes the “patient” is the community. The punishment of death has the good of the community as its end, rather than the good of the offender. Thomas will argue that the community may execute an evildoer when this is necessary to preserve the common good. Thomas’s justification for CP presupposes that killing a human person is not already an act bad in its species. If it were, then it could not be used to serve the good of the community. The first part of this chapter will analyze the act of killing as punishment. Thomas maintains that the act of killing is further specified by the circumstances ‘to whom’ and ‘by whom,’ with the result that an act of CP has a moral object different from an act of murder.

To say that CP is morally licit is not the same as to say that it is necessary, or that those who commit grave wrongs must be executed. The second part of this chapter treats Thomas’s understanding of CP, not merely as an individual human act, but as a social institution. CP, like other punishments, is a specific determination of the natural law, which can vary according to time and place. Therefore, CP is not a necessary punishment. Where it is useful to the common good and in accord with human custom, it ought to be used, but where it is not useful to the common good, and is not in accord with custom, it ought not to be used.

A.1. Central Texts: S.T. II-II, q. 64, a. 2 and S.C.G. III. c. 146

The most direct source for St. Thomas's view of CP is the second article of *S.T.* II-II, q. 64, "Whether It Is Lawful to Kill a Sinner." He also addresses the legitimacy of the death penalty in Chapter 146 of the *Summa Contra Gentiles*, entitled "That it is Lawful for Judges to Inflict Punishments." In q. 64, Thomas undertakes a moral analysis of different forms of killing, and determines which kinds of killing are forbidden by moral and divine law, and which are not.¹ Thomas of course introduces his own position in q. 64, a. 2 by referring to the relevant authorities, in this case Scripture. The *sed contra* has two passages, one from Exodus (22.18), "Wizards² thou shalt not suffer to live," and one from Psalm 100 (v. 8), "In the morning I put to death all the wicked of the land."

When Thomas quotes from Exodus, he does not enlist the authority of Mosaic Law in order to assert that everyone who accepts the authority of Scripture must accept the Mosaic list of capital crimes. Rather, he explains that the judicial precepts of the Old Law, received through Moses, lost their binding force with the coming of Christ, when the state of the people changed.³ This is generally what happens when there is a change in regime, as Aristotle notes (a democracy, for instance, requires different laws than an oligarchy).⁴ The Law of Moses was given to the Hebrew people, and as long as the

¹ This kind of analysis is not limited to acts of killing. Aquinas follows the same method whether treating theft, lying, gluttony, piety, magnanimity, and a host of other vices and virtues.

² *Maleficos* is rendered 'wizards' in Douay-Rheims. The New Vulgate has instead *maleficam*; thus 'sorceress' in the RSV.

³ *S.T.* I-II, q. 104, a. 3.

⁴ *S.T.* I-II, q. 104, a. 3, ad 2. See *Politics* IV.1. All references to the *Politics* are from the translation by Benjamin Jowett in *The Basic Works of Aristotle*, edited by Richard McKeon (New York: Random House, 1941).

community of Israelites remained under the old covenant; that is, before the coming of the Messiah, they were bound by these laws.

Those judicial precepts directed the people to justice and equity, in keeping with the demands of that state. But after the coming of Christ, there had to be a change in the state of that people, so that in Christ there was no distinction between Gentile and Jew, as there had been before. For this reason the judicial precepts needed to be changed also.⁵

This does not mean that a Christian state could not use some of the judicial precepts of the Law of Moses, Thomas notes, but they no longer carry the binding force of the Old Law.⁶ Thus, a mediaeval state could punish murder, adultery, etc. with death, but it was not always obligated to do (as those under the Old Law were).

So far, we have only established what Thomas does not do in his approach to CP: he does not argue that because CP is mandated in the Pentateuch, it is mandated for all times. Instead, his central argument is related to the danger presented by the evildoer to the good of the (political) community. The body of q. 64, a. 2 reads:

As stated above [a. 1], it is lawful to kill dumb animals, in so far as they are naturally directed to man's use, as the imperfect is directed to the perfect. Now every part is directed to the whole, as imperfect to perfect, wherefore every part is naturally for the sake of the whole. For this reason we observe that if the health of the whole body demands the excision of a member, through its being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away. Now every individual person is compared to the whole community, as part to whole. Therefore if a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since "a little leaven corrupteth the whole lump" (1 Corinthians 5:6).

⁵ S.T. I-II, q. 104, a. 3, ad 3.

⁶ S.T. I-II, q. 104, a. 3.

In the first sentence, Thomas lays out the principle that the imperfect is naturally directed to (for the sake of) the perfect, and he gives dumb animals as an application of the principle. The argument may be formulated as follows:

What is imperfect compared to man is naturally directed to man's use.
A dumb animal is imperfect compared to man.
Therefore, a dumb animal is naturally directed to man's use.

Thomas then introduces the part/whole relationship as another application of the principle, for part is to whole as imperfect is to perfect:

What is imperfect compared to the community is naturally directed to the community's use.
The individual is imperfect as compared to the community.
Therefore, the individual is naturally directed to the community's use.

When a criminal is executed for the common good, he is being "used" for the good of the community.

Thomas's argumentation in the *S.C.G.* is the same:

Moreover, the common good is better than the particular good of one person. So, the particular good should be removed in order to preserve the common good. But the life of certain pestiferous men is an impediment to the common good which is the concord of human society. Therefore, certain men must be withdrawn by death from the society of men.

Just as a physician looks to health as the end in his work, and health consists in the orderly concord of humors, so, too, the ruler of a state intends peace in his work, and peace consists in "the ordered concord of citizens." Now, the physician quite properly and beneficially cuts off a diseased organ if the corruption of the body is threatened because of it. Therefore, the ruler of a state executes pestiferous men justly and sinlessly in order that the peace of the state may not be disrupted.⁷

The common good is better (*melius*) than the particular good, and this is the good intended by the ruler of a state (*rector civitatis*). This common good is peace, or "the

⁷ Book III, c. 146, n. 4.

ordered concord of citizens” (*civium ordinata concordia*), which may be disrupted by “pestiferous men” (*homines pestiferi*). The meaning of pestiferous must be understood from the context. Since the common good of human society is the ordered concord of citizens, one who corrupts this order is destructive to it, or as illness is to health.⁸

The Aristotelian foundation for the claim that the whole is prior to the part is the priority of the actual over the potential. What is perfect, or what is whole, is actual, and what is imperfect, or part, is potential. That what is actual is prior to what is potential, and that therefore “the whole is of necessity prior to the part,”⁹ is known through simple apprehension, according to Aristotle and Thomas. It is evident to anyone who knows what is meant by actual and potential, perfect and imperfect, and whole and part, that the first is prior to the second in each pair. Chapter III will address this principle in more detail.

Not surprisingly, many have found fault with this line of argumentation. Even if we grant that the part is to the whole as imperfect to perfect, on what grounds does Thomas say that the imperfect is “naturally directed to” the perfect? What is directed to another exists for the sake of that other. As matter is for the sake of form, so the part is for the sake of the whole, and the imperfect for the sake of the perfect. For example, since an animal’s foot is part of the animal, the foot exists for the sake of the animal. This does not exclude the possibility that what exists for the sake of another also, in another sense, exists for its own sake. For that which is a part of a whole may itself be a whole, on

⁸ Pestifer: “I. Bringing pestilence ... II. In gen., that brings destruction, destructive, baleful, noxious, pernicious, pestiferous.” Lewis and Short, *Latin dictionary*, s.v. “pestifer.”

⁹ *Politics* I.2.1253a20.

another level of being. For example, a word is a whole, composed of syllables, but also a part of another whole, the sentence. Each substance is a whole, for it has “unity of form.”¹⁰ As a substance, each human being is a whole, even if he is also a part of some greater whole.

If a part exists for the sake of the whole, then its natural (formal) function is to serve the good of the whole. If it does not serve the good of the whole, but in fact threatens it, then the part has lost its reason for being qua part. In such a case, the part can only contribute to the good of the whole by ceasing to be a part. Again, this argument leaves open the possibility that what is for the sake of another may also be, in another sense, for its own sake. From the perspective of the whole, the part has no reason to exist and may be disposed of. From the perspective of the part qua whole, it exists for itself, and therefore always preserves its reason to exist.

Thomas asserts that the relationship of part to whole, of imperfect to perfect, is true of the individual man in relation to the community to which he belongs. The individual man is part of the political community, or the state. Therefore, if he poses a threat to the community by his evil acts, he may be killed for the good of the community. This conclusion is repeated in the next article:

It is lawful to kill an evildoer in so far as it is directed to the welfare of the whole community, so that it belongs to him alone who has charge of the community’s welfare. Thus it belongs to a physician to cut off a decayed limb, when he has been entrusted with the care of the health of the whole body.¹¹

Again, in a later question on whether maiming is ever justified, we read that

¹⁰ Aristotle *Metaphysics* V.6.1016b11. *The Basic Works of Aristotle*, translated by Richard McKeon, (New York: Random House, 1941).

¹¹ *S.T.* II-II, q. 64, a. 3.

since a member is part of the whole human body, it is for the sake of the whole, as the imperfect for the perfect. Hence a member of the human body is to be disposed of according as it is expedient for the body. Now a member of the human body is of itself useful to the good of the whole body, yet, accidentally it may happen to be hurtful, as when a decayed member is a source of corruption to the whole body.... [T]he whole of man is directed as to his end to the whole of the community of which he is a part ... [hence] by public authority a person is lawfully deprived of life altogether on account of certain more heinous sins.¹²

Thomas's choice of medical analogy communicates the gravity of the situation. Medicine regards amputation as a last resort; if anything else can be done to preserve the bodily health of the patient, then the doctor will not choose to amputate a limb. Thomas articulates the principle in q. 65:

A member should not be removed for the sake of the bodily health of the whole, unless otherwise nothing can be done to further the good of the whole.¹³

Thomas cites this principle in response to an objection on the legitimacy of maiming, but it is also the principle assumed in q. 64, a. 2, where he says that “if the health of the whole body demands the excision of a member, through its being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away.” Just as it is lawful to maim someone only when there is nothing else to be done for the welfare of his whole body, so it is lawful to cut off a person from the political community only when nothing else will preserve the welfare of the whole community.

It is worth noting that when Thomas addresses killing an evildoer for the good of the community, he does not use the Gospel passage where Jesus admonishes his followers, “And if your hand causes you to sin, cut it off...” (Mark 9:43). There is good reason why Thomas might not have wanted to use this passage. The Council of Nicaea

¹² *S.T.* II-II, q. 65, a. 1.

¹³ *S.T.* II-II, q. 65, a. 1, ad 3.

(325) rejected the literal interpretation of this passage when it condemned castration as an aid to chastity. His use of the passage in this context might have implied a literal interpretation. In the question on maiming, one of the objections says that since “the welfare of the soul is to be preferred to the welfare of the body ... [and] it is not lawful for a man to maim himself for the sake of the soul’s welfare ... Therefore it is not lawful for any other reason to maim a person.”¹⁴ Thomas responds with the principle that it is legitimate to remove a member, only if nothing else can be done for the good of the whole. However, “it is always possible to further one’s spiritual welfare otherwise than by cutting off a member, because sin is always subject to the will.”¹⁵ Therefore, it is not lawful for a person to maim himself for the good of his soul, because there is always another way to preserve his spiritual health.

On the other hand, it is lawful for a person to maim himself for the good of his body, if there is nothing else he can do to preserve the life or health of his whole body. Similarly, Thomas argues that it is lawful to cut off a person from the political community, when nothing else will further the good of the whole. He says nothing to indicate that the good he has in mind is an abstract, spiritual good. Rather, following his own logic in the question on maiming, the good being threatened by the evildoer is precisely the good of public order and safety. There are always ways to promote public respect for justice other than killing evildoers. Therefore, when an evildoer does not present a threat to the safety of others and to public order, the justification for CP is lacking.

¹⁴ *S.T.* II-II, q. 65, a. 1, arg. 3.

¹⁵ *S.T.* II-II, q. 65, a. 1, ad 3.

In this section, we have seen Thomas's primary philosophical argument for the legitimacy of. He says the political community has the power to inflict death on those evildoers who threaten its existence. This power is based on the relationship of individual to community as a relationship of part to whole. The individual man is a part of the political community. It is true of any whole that it is greater than its parts and that its parts are for the sake of the whole. This is an instance of the more general principle that the imperfect is for the sake of the perfect. Thomas compares the political community to another kind of whole, a living body. He does not mean to imply that the state is an organism or a substance, something he explicitly denies elsewhere. Rather, he considers both cases to fall under the principle of the priority of the whole to its parts, a principle which is true of all wholes.

A.2. Objections and Replies

We now turn to the objections that Thomas considers to his defense of CP. Most of these objections are drawn from Scripture. There are three objections in q. 64, a. 2. The first cites Matthew 13, where Christ "forbade the uprooting of the cockle which denotes wicked men according to a gloss."¹⁶ Sometimes there is a danger of cutting off the healthy along with the unhealthy, i.e., that if CP is used, some innocent men will be killed. In his response, Thomas agrees that in cases where it is not possible to punish the guilty without also punishing the good, "vengeance is delayed." In following this principle, human authorities imitate divine authority, since God does not immediately

¹⁶ S.T. II-II, q. 64, a. 2, arg. 1.

punish every sin. However, when the good are not harmed, but actually protected, by the death of the wicked, “then the latter may be lawfully put to death.”¹⁷ The same objection, using the same Gospel passage, is raised in the *S.C.G.*, and Thomas answers in the same way: “the execution of the wicked is forbidden wherever it cannot be done without danger to the good.”¹⁸

The second objection is also scriptural, this time from Ezekiel, where the Lord says, “I desire not the death of the wicked, but that the wicked turn from his way and live” (33:11). Since human justice ought to imitate divine justice, the argument goes, the state should not kill criminals but allow them time to repent. A similar objection is presented in the *S.C.G.*, without direct reference to Scripture, where Thomas says that some “also allege that so long as a man is existing in this world he can be changed for the better. So, he should not be removed from the world by execution, but kept for punishment.”¹⁹

To the objection that human justice ought to imitate God in sparing evildoers, Thomas responds, Thus,

God sometimes slays sinners forthwith in order to deliver the good, whereas sometimes He allows them time to repent, according as He knows what is expedient for His elect. This also does human justice imitate according to its powers; for it puts to death those who are dangerous to others, while it allows time for repentance to those who sin without grievously harming others.²⁰

Thomas does not provide examples of divine slaying of sinners, but they are not difficult to find. In Numbers, God causes the earth to open up and swallow alive Korah and his

¹⁷ Ibid.

¹⁸ *S.C.G.* III, c. 146, n. 9.

¹⁹ *S.C.G.* III, c. 146, n. 8.

²⁰ *S.T.* II-II, q. 64, a. 2, ad 2.

followers for their rebellion against Moses (16.32); in Acts, Ananias and Sapphira fall down dead at the feet of Peter for their deception of the apostles (5.1-10).

In Thomas's response, we see both how human justice imitates divine justice and how it focuses on the medicinal ends of punishment. Like divine justice, human justice is concerned with the welfare of the good and the conversion of the wicked, both of which are medicinal ends. Human justice must imitate divine justice not simply, but as it is able (*pro posse*). In pursuing either of the two medicinal ends mentioned here, the human judge is faced with uncertainty. Will allowing the criminal to live make him more likely to amend his ways? Will he pose a continued threat to others as long as he lives? Perfect certainty on either question is unattainable, so the judge must proceed cautiously. Does this mean that he should always err on the side of sparing the criminal's life, since there is always a chance that he may convert? Thomas answers this when he addresses the objection in the *S.C.G.*:

Finally, the fact that the evil, as long as they live, can be corrected from their errors does not prohibit the fact that they may be justly executed, for the danger which threatens from their way of life is greater and more certain than the good which may be expected from their improvement.²¹

Thomas mentions two goods that are relevant to the determination of punishment: the good that may be expected from the converted criminal and the protection of the innocent. Although this does involve a weighing of different goods, Thomas has not abandoned natural law for a kind of consequentialism. For this weighing of goods presupposes that punishment is already justified in response to the evil that has been committed. But the natural law precept that says evil is to be punished must be specified,

²¹ *S.C.G.* III, c. 146, n. 10.

which is done by human law. Human law aims at the political common good, and so what Thomas mentions here are two courses of action, each of which might benefit the community.

If the evildoer is allowed to live, he may turn away from his evil path and contribute to the good of the community. If he is executed, the innocent are protected from any further evil by this particular agent or by those under his influence. Thomas asks us to think about which of these ways of serving the common good is more reasonable. The first way offers a double benefit to the common good; if the evil man turns from his evil way and does good, then the innocent are protected *and* the former evildoer can contribute to the community's good. Yet the success of this way depends in the end on the will of the evildoer himself, and is for that reason uncertain. The second way to benefit the common good is within the power of the state to achieve and is more certain than the first. It assuredly protects the innocent, at least from this particular evildoer, but does not achieve the other benefit, since the evildoer (even if he were to convert from his ways before death) no longer belongs to the community and can no longer contribute to it. The judge, or whoever has authority to sentence, is bound, within the confines of law, to choose the punishment most likely to promote the common good. For Thomas, when an individual presents a grave threat to the common good, and when other means would be insufficient to protect this good, it is just to choose execution, which is a choice for a lesser but more certain benefit to the common good.

It is essential to note that the goods Thomas compares here are both common goods, i.e., different ways of benefiting the community. He does not get embroiled in

weighing the good of the individual against the common good, which for him would be a futile exercise. It would be futile because the individual's good and the political common good are goods of different genera, as we will see in Chapter III. Law properly regards not the good of the individual, but the common good. Therefore the lawmaker must consider what course is best for the community. This does not mean that the good of individuals is irrelevant to law; on the contrary, it has their happiness always in sight. But the happiness of individuals depends on obedience to a law that is directed toward the specifically common good. Again, Chapter III will address the common good in greater depth.

Even though capital punishment rules out the possibility of future contribution to the common good by the sentenced individual, it does not rule out the possibility of conversion altogether. Thomas notes that evildoers “also have at the critical point of death the opportunity to be converted to God through repentance.”²² In another place, Thomas adds “moreover the death inflicted by the judge profits the sinner, if he be converted, unto the expiation of his crime; and, if he be not converted, it profits so as to put an end to the sin, because the sinner is thus deprived of the power to sin any more.”²³

The third objection of q. 64, a. 2 is the most challenging so far to Thomas's position. For while the first two objections focus on practical limitations in applying the death penalty (the danger of harming the innocent and the possibility of repentance), this last objection, if successful, would amount to an absolute prohibition of capital punishment:

²² *S.C.G.* III, c. 146, n. 10.

²³ *S.T.* II-II, q. 25, a. 6, ad 2.

Further, it is not lawful, for any good end whatever, to do that which is evil in itself, according to Augustine (*Contra Mendac.* VII) and the Philosopher (*Ethics* II.6). Now to kill a man is evil in itself, since we are bound to have charity towards all men, and *we wish our friends to live and to exist*, according to *Ethics* IX.4. Therefore it is nowise lawful to kill a man who has sinned.

A related objection to corporeal punishments is found in the *S.C.G.*, from “these people [who] adduce as a basis for their error the text of Exodus (20:13): ‘Thou shalt not kill.’”²⁴ We may group these objections together, since they both claim that to kill is evil in itself, whether the authority is Aristotle or the Ten Commandments. This objection is crucial, for two reasons. First, if killing a man is evil in itself, it cannot be justified by being directed to any good, no matter how great a good. Second, if killing a man is always in itself an evil act, we will be forced to conclude either that God commanded the ancient Israelites to do evil, or that the Scriptures are wrong in attributing a divine origin to the authority to punish certain crimes with death.

The objection based on the Fifth Commandment has a fairly straightforward answer; Thomas in fact calls the argument “frivolous,” since even a cursory knowledge of the Old Testament reveals its flaws:

In the law which says, ‘Thou shalt not kill’ there is the later statement: ‘Wrongdoers (*maleficos*) thou shalt not suffer to live’ (Exod. 22.18). From this we are given to understand that the unjust execution of men is prohibited.²⁵

Moses and the ancient Israelites did not understand the Fifth Commandment to forbid all kinds of killing, but only killing of innocent men. If Aquinas had been reading the original Hebrew of Exodus, he might also have pointed out that the Hebrew word is more restricted in meaning than the Vulgate’s *occidere*: “Old Testament scholars tell us that

²⁴ *S.C.G.* III, c. 146, n. 7.

²⁵ *S.C.G.* III, c. 146, n. 9.

the word—*rasah*—used in the decalogue and elsewhere of prohibited killing, was never applied to killing criminals by the society, or to killing in war.”²⁶ In any case, Aquinas follows Augustine and most of the Fathers of the Church in interpreting the commandment as forbidding murder:

The slaying of a man is forbidden in the decalogue, in so far as it bears the character of something undue: for in this sense the precept contains the very essence of justice. Human law cannot make it lawful for a man to be slain unduly. But it is not undue for evil-doers or foes of the common weal to be slain: hence this is not contrary to the precept of the decalogue; and such a killing is no murder as forbidden by that precept, as Augustine observes (*De Lib. Arb.* I.4). In like manner when a man’s property is taken from him, if it be due that he should lose it, this is not theft or robbery as forbidden by the decalogue.²⁷

For Aquinas, as for Augustine, there are no exceptions to the precepts of the Decalogue. For “precepts admit of dispensation, when there occurs a particular case in which, if the letter of the law be observed, the intention of the lawgiver is frustrated.”²⁸ Some laws, however, “contain the very intention of the lawgiver,” and so cannot be dispensed. The intention of the law prohibiting murder is to protect the lives of innocent men. This intention can never be served by violating the letter of the law, since the letter contains the intention. The Ten Commandments contain the very intention of the lawgiver, God; “consequently the precepts of the decalogue admit of no dispensation whatever.”²⁹ Thus there are no exceptions to the precept, “Thou shalt not kill.”

²⁶ Augustine Regan, *Thou Shalt Not Kill*, 11. See also Hertz, *Pentateuch and Haftorahs*, note on Exod. 20:13.

²⁷ *S.T.* I-II, q. 100, a. 8, ad 3. Thomas also quotes Augustine in his *Collationes de decem praeceptis*, and concludes that “the sense, therefore, of ‘Thou shalt not kill’ is that one shall not kill by one’s own authority.” *Catechetical Instructions of St. Thomas Aquinas*, translated by Rev. Joseph B. Collins (New York City: Joseph F. Wagner, 1939), 93-94.

²⁸ *S.T.* I-II, q. 100, a. 8.

²⁹ *S.T.* I-II, q. 100, a. 8.

So the theological objection to killing as punishment is not tenable, but the objection was offered in philosophical terms as well, that one must not do evil for a good end, and that to kill a man is evil. To this, Thomas offers a philosophical response:

By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free, and exists for himself, and in a certain way he falls into the slavery of the beasts, so that he may be ordered to what is useful for others (*incidit quodammodo in servitutem bestiarum, ut scilicet de ipso ordinetur secundum quod est utile aliis*). This is expressed in Psalm 48:21: “Man, when he was in honor, did not understand; he hath been compared to senseless beasts, and made like to them,” and Proverbs 11:29: “The fool shall serve the wise.” Hence, although it be evil in itself to kill a man so long as he preserve his dignity, yet it may be good to kill a man who has sinned, even as it is to kill a beast. For a bad man is worse than a beast, and is more harmful, as the Philosopher states (*Politics* I.1 and *Ethics* VII.6).³⁰

There is a difference between killing a good man and killing an evil man, who has put himself outside the order of reason. The difference is that the former preserves and furthers the common good, while the latter corrupts it.³¹ In the very next article (q. 64, a. 3), however, Thomas seems to contradict this notion. The article asks whether a private man can kill an evildoer, and the second objection makes use of the evildoer-beast comparison. If the evildoer is like a beast, the objection goes, and it is lawful for a private man to kill a wild beast, then it is also lawful for a private man to kill an evildoer (who, as Aristotle says, is worse than a beast).³² Thomas replies,

A beast is by nature distinct from man, wherefore in the case of a wild beast there is no need for an authority to kill it; whereas, in the case of domestic animals, such authority is required, not for their sake, but on account of the owner’s loss. On the other hand *a man who has sinned is not by nature distinct from good men*; hence a public authority is requisite in order to condemn him to death for the common good.³³

³⁰ *S.T.* II-II, q. 64, a. 2, ad 3.

³¹ *S.T.* II-II, q. 64, a. 6.

³² *Ethics* VII.6.

³³ *S.T.* II-II, q. 64, a. 3, ad 2 (emphasis mine).

The evildoer shares in the same nature as other men. A man's bad acts can never deprive him of his essential nature, and so he cannot be dealt with in the same way as an irrational animal. It is only lawful to kill a sinner "in so far as it is directed to the welfare of the whole community," whereas a beast can be killed for a man's private good.³⁴

From this it is clear that we must understand Thomas's statement that an evil man "falls into the slavery of the beasts" as a figure of speech. Though the evildoer may lose "the dignity of his manhood," he does not lose his manhood itself. The psalm he quotes in support of the comparison speaks in terms of simile: "compared to senseless beasts, and made like to them."³⁵ Even the idea that the bad man is worse and more harmful than a beast supports the fact that even the worst evildoers retain their human nature. The reason the bad man is worse, according to Aristotle, is that he has an internal principle of his badness: his intellect.³⁶ A beast can destroy, but it can never act with malicious design. Thomas states the case even more exactly when he says that moral evil (fault) exists only in an intellectual nature.³⁷ Thus, the wickedness of the evildoer does not indicate a change of nature; rather, it presupposes the possession of that nature.

What then is the *servitus bestiarum*, if not a change in nature? Thomas contrasts this state of servitude with the *dignitas humana*: the good man "is naturally free and exists for himself." Essentially, the evildoer is a man, but in relation to the whole

³⁴ *S.T.* II-II, q. 64, a. 3.

³⁵ Psalm 48:21 (Douay Version).

³⁶ "For in each case the badness of something that lacks an internal principle of its badness is less destructive than the badness of something that has such an internal principle; and understanding is such an internal principle. It is similar, then, to a comparison between the injustice [of a beast] and an unjust human being; for in a way each [of these] is worse, since a bad human being can do innumerable more bad things than a beast." *Ethics* VII.6.1150a5-9.

³⁷ *De Malo*, q. 1, a. 4.

community he is like a beast precisely in his state of servitude. For Thomas, as we will see in Chapter III, all individual men are parts of a civil community. They are free parts, voluntarily subjecting themselves to the civil order. Those who refuse to subject themselves to that order by committing grave crimes can still be subject to that order, but only involuntarily, through punishment. It is not that because a man has become like a beast, he may be treated like a beast. Rather, because he does not order himself to the common good, he must be ordered to the common good by an extrinsic agent, as a beast is.

What of the idea that while the good man exists for himself, the evildoer is ordered according to what is useful for others? “What is useful for others” here can mean nothing else than the political common good. The good of one individual is not subordinate to the good of another individual, but the good of an individual is subordinate to the common good. All civil law aims at the common good and not the good of an individual; this is part of Thomas’s definition of law.³⁸ So both good and evil men are ordered according to what is useful for the common good. The good, however, order themselves to the common good, while evildoers must be ordered to that good by force.

Yet in pointing out the difference between killing the innocent and the guilty, it may seem that Thomas is assuming the very thing he is trying to prove, i.e., that killing a man is not always evil in itself. In fact, this is not a case of question-begging, but in order to see this, we need to recall the idea that “whenever a circumstance has a special relation to reason, either for or against, it must needs specify the moral action whether good or

³⁸ *S.T.* I-II, q. 90.

bad.”³⁹ The objection does not consider rationally significant differences when it comes to killing a man, or perhaps assumes that none exist. Thomas’s response is to describe a rationally significant difference: the one being killed has departed from the “order of reason” and the “dignity of his manhood.” An act directed against someone who has departed from the order of reason, on account of that departure, is an act of a different species than a similar act directed against one who has not departed from the order of reason. Therefore, there is a rational difference between killing the guilty and killing the innocent, which specifies these acts as acts of punishment and acts of murder.

In his *Commentary on the Sentences*, Thomas describes the difference between CP and murder as one of moral species (*species moris*):

[T]o kill the guilty and the innocent do not differ according to natural species, but according to moral species: because one is an act of vice, namely homicide, the other an act of virtue, or justice ...⁴⁰

Human law and custom confirm the idea that CP belongs to a different moral species than murder. Practical reason, as we will see below, manifests itself both in words (law) and in deeds (custom).⁴¹ In every government with which Thomas was familiar, human reason had made CP a part of its law and custom. For him, this would confirm the existence of a rational distinction between killing as punishment and murder.

In response to the three objections to his argument in q. 64, Thomas has given the following answers: first, it is not good for human authorities to punish evildoers with death when to do so would harm the good members of the community, but they may do

³⁹ *S.T.* I-II, q. 18, a. 10.

⁴⁰ *Super Sent* III, 23 q. 3 a. 1 qc. 3 co: “occidere nocentem et innocentem non differunt secundum speciem naturae, sed secundum speciem moris: quia unum est actus vitii, scilicet homicidii, alterum actus virtutis, sive iustitiae ...” He makes the same point also in *Super Sent* IV, d. 26, q. 1, a. 3, ad 5.

⁴¹ *S.T.* I-II, q. 97, a. 3.

so when such punishment protects and saves the good. Second, human authorities are right to be concerned with the welfare of the evildoer as they inflict punishments. Yet the welfare of the whole community is more properly their concern, and this sometimes requires the killing of an evildoer. Finally, there is a rationally significant difference between killing the guilty and killing the innocent, and this lies in the fact that the evildoer departs from the order of reason. We may come to a better understanding of this last and most controversial claim by understanding some of the other differences that specify acts of killing.

A.3. Other Acts of Killing

So far we have focused on the article of q. 64 that deals directly with CP, but it is now necessary to place that article within the context of the question as a whole. Each article of q. 64 addresses one or more of the circumstances affecting the moral analysis of the act of killing. The articles are: (1) the killing of plants and non-rational animals (“beasts”), (2) the killing of evildoers, (3) the killing of evildoers by private persons, (4) the killing of evildoers by clerics, (5) suicide, (6) killing the innocent, (7) killing in self-defense, and (8) accidental killing. In the articles on killing of animals, of evildoers, and of just men, Thomas considers the act of killing with regard to the one being killed. In the articles on suicide and killing by private persons, he considers the act of killing with regard to the authority of the agent who kills. In the article on killing by clerics, he also considers the circumstance *by whom* the killing is done, not on account of authority but of

fittingness. In the articles on killing in self-defense and killing by chance, he considers acts with a different proximate end.

The first kind of killing that Thomas considers is the killing of plants and non-rational animals. It is not unlawful, Thomas says, to use something for the purpose for which it exists. In the order of nature, the imperfect is for the sake of the perfect, and thus plants are for the preservation of animal life and beasts for the preservation of human life. To use plants and beasts in this way requires killing them. Since the act of killing a plant or beast is an act of using what is for the use of rational animals, it cannot be wrong by its species. Still, this kind of killing can be made evil by the lack of due circumstances. Since private property is the customary way of regulating the use of things destined for the general use of man, it is one of the due circumstances of the act of using a cow for food that the cow belong to the one using it. The end may also affect the goodness of the act. Even though beasts are rightfully for the use of men, the destruction of a beast for an end that is not due (e.g., out of spite) would not be a good act.

Articles 2-8 deal with the killing of human beings under different circumstances. The acts addressed in these chapters fall under the same natural species, but not the same moral species. In the action of killing a man, the due circumstances answer the questions ‘to whom’ (articles 2, 6) and ‘by whom’ (articles 3, 4, 5). Articles 7 and 8 pertain to circumstances answering the questions ‘why’ and ‘in what manner.’ We have already considered a. 2, so now let us turn to the other kinds of killing.

Article 3, “Whether It Is Lawful for a Private Individual to Kill a Man Who Has Sinned,” considers the circumstance, ‘by whom the act is done.’ This circumstance bears

a rational relationship to the act. The reason for killing the evildoer is that he is corrupting or will corrupt the common good (a. 2). Since it is only right to kill a man insofar as it is directed to the good of the whole community, "... it belongs to him alone who has charge of the community's welfare" to instigate such an act.⁴² The one who has charge of the common good is the public authority, whether this is one person or many. Thus, in the third article, we read that it is not lawful for a private person to kill an evil man. We can call this the due circumstance of authority. Suicide (a. 5) is unlawful for a similar reason: the individual man is part of the good of the whole, and so in killing oneself, he harms the good of the community. Lacking authority to direct individuals to the community's good, he cannot lawfully kill himself, even if this were for the common good. Thus, even a man sentenced to death cannot rightly kill himself.⁴³

Article 4, "Whether It Is Lawful for Clerics to Kill Evildoers," also pertains to the circumstance, 'by whom the act is done,' but here it is not a question of authority, but fittingness. The presence of legitimate authority is presupposed in this article; otherwise, the answer would be evident from the previous article. Rather, even if a cleric has care for the common good, his proper concern is the spiritual good of persons. Thomas gives two reasons for the impropriety of clerical involvement in the death penalty:

First, because they are chosen for the ministry of the altar, whereon is represented the Passion of Christ slain "Who, when He was struck did not strike" [Vulgate: 'When He suffered, He threatened not'] (1 Peter 2:23). Therefore it becomes not clerics to strike or kill: for ministers should imitate their master, according to Sirach 10:2, "As the judge of the people is himself, so also are his ministers." The other reason is because clerics are entrusted with the ministry of the New Law,

⁴² S.T. II-II, q. 64, a. 3.

⁴³ It would seem that someone like Socrates, who was sentenced to drink hemlock, does not commit suicide. He kills himself, but not by his own authority; he acts according to law as his own executioner.

wherein no punishment of death or of bodily maiming is appointed: wherefore they should abstain from such things in order that they may be fitting ministers of the New Testament.⁴⁴

Some see this as a double standard, wherein priests are held to the full demands of the Gospel message, while lay persons are held to a modified standard, more fitted to their life in the world. But it is only a double standard if CP is morally evil. If, as Thomas argues, the death penalty is not morally evil, then clerics are being called to forgo involvement in something legitimate for the sake of a greater good. That is, while it is legitimate to be further the common good of the temporal community through the execution of those who threaten it, it is even better to further the common good of the spiritual community through the ministry of the priesthood.

Article 7 asks “Whether It Is Lawful to Kill a Man in Self-defense.” Thomas’s analysis of self-defense shows that it is legitimate insofar as the act has a different object than an act of murder. The object of an act of murder includes the killing of a person in its description, but the act of (legitimate) self-defense does not. The proximate end of self-defense is to preserve one’s own life: “Therefore an act of this sort, from the fact that the preservation of one’s own life is intended, is not unlawful, as any natural thing will preserve itself in being, as far as possible.”⁴⁵ The *means* in the act we are considering is some kind of physical force. The object of an act of self-defense is thus to preserve one’s life by using force against an aggressor. If the object is to preserve one’s life by killing the aggressor, the act is not justified, Thomas argues. If killing enters into the act of self-

⁴⁴ S.T. II-II, q. 64, a. 4.

⁴⁵ S.T. II-II, q. 64, a. 7: “Actus igitur huiusmodi ex hoc quod intenditur conservatio propriae vitae, non habet rationem illiciti, cum hoc sit cuilibet naturale quod se conservet in esse quantum potest.”

defense as part of the object (i.e., if the defender intends to kill the aggressor), then the act is no longer an act of legitimate self-defense, but an act of murder.

The act of intending to kill in self-defense falls short of the due circumstance of authority (a. 3), unless of course, authority is present. Thus, when St. Thomas says that “... it is not lawful for a man to intend killing a man in self-defense, *except* for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good ...”⁴⁶ So, for instance, the soldier in battle and “the minister of the judge struggling with robbers” (i.e., a policeman or prison guard), when defending themselves in the course of duty, may intend to kill, “although even these sin if they be moved by private animosity.”⁴⁷ In other words, even if the object of the act (the killing of an unjust aggressor by a lawful authority) is good, the act may be bad if it is motivated by evil desire.

Besides the circumstance of end, the means (‘with what’) and manner (‘in what way’) are also relevant in the moral analysis of self-defense. The force used to repel the attack must be proportional to the attack itself. In the act of self-defense, the means and manner may determine the morality of the act, by touching on its essence. Therefore, if I defended myself from an unarmed aggressor by shooting him in the head, my act would be unlawful. My chosen means (a gun) and manner (aiming for the head) have rational significance for this kind of act, which is an act of intentional killing by a private person, i.e., murder.

⁴⁶ S.T. II-II, q. 64, a. 7 (emphasis mine).

⁴⁷ S.T. II-II, q. 64, a. 7.

In killing by chance (a. 8), the very fact that the act is ‘by chance’ (*casualiter*) means that the intended end of the act is not the death of a person. In the case of legitimate self-defense (a. 7), it is also true that death is not the intended end, but it is perceived as a possible outcome. In the case of killing by chance, however, the action is not one that typically or foreseeably results in a person’s death: “Now it sometimes happens by chance that a person is killed as a result of something done for a good purpose. Therefore the person who did it is not accounted guilty.”⁴⁸

The Book of Deuteronomy (19:5) gives the example of the man who “goes into the forest with his neighbor to cut wood, and his hand swings the axe to cut down a tree, and the head slips from the handle and strikes his neighbor so that he dies” The end of this act is not the neighbor’s death, but the felling of the tree. The killing of the neighbor happens by chance, similar to the way “natures subject to generation and corruption fail in some few cases on account of some obstacle.”⁴⁹ Mosaic Law recognizes the difference between intentional and accidental killing; while for the former, it mandates the death penalty, for the latter it designates certain cities as places of refuge for those guilty of manslaughter, protecting them from reprisal by the Avenger of Blood (Deut. 19:4-6).

On the other hand, both the Mosaic and the Thomistic tradition allow for the punishment of involuntary homicide, which, since it results from culpable neglect, is somewhat voluntary. In Exodus (21:29), a man whose ox gores another man may be punished with death “if the ox has been accustomed to gore in the past, and its owner has been warned but has not kept it in.” This is an example of acting without due care, one of

⁴⁸ S.T. II-II, q. 64, a. 8, s.c.

⁴⁹ S.T. I-II, q. 94, a. 4.

the categories of involuntary homicide given by St. Thomas. The other category is the causing of another's death (though unintentionally) while engaged in something unlawful.⁵⁰ So for example, the man who, while breaking into another's house, accidentally sets the house on fire, killing the owner of the house, is guilty of the murder of the owner.

Now, for any kind of action, there is no limit to the number of possible circumstances. Yet some circumstances do not affect the goodness of the act because they have no rational significance. For example, the city in which a murder occurred or the time of day at which it occurred do not affect the morality of the murderous act. In q. 64, we have seen Thomas analyze the most important circumstances of an act of killing, i.e., *to whom, by whom, and for what end*. When one of these circumstances is lacking, the act falls under another moral species, as we have seen in Thomas's analysis of other kinds of killing. In order for the killing of a man to be an act of punishment (a specifically good act) it must be done to one who is guilty of grave evil, by one who has the proper authority to punish evildoers, and for the sake of the common good.

In this section, we have seen how Thomas defends the killing of some evildoers by civil authority in certain cases for the sake of the common good. He does so with reference to the political community as a whole, of which individual citizens are the parts. The good of this whole is the end that civil punishment serves. Those who act for the good of the whole (civil authorities) are right to prefer this good to any private good.

⁵⁰ S.T. II-II, q. 64, a. 8.

B The Institution of Capital Punishment

To say that the killing of a wrongdoer is lawful is not the same as to say that it is *necessary*, or that those who commit grave wrongs must be executed. Does Thomas think that capital punishment is not only permissible, but also required? Is it unjust to punish certain crimes with anything less than death? In this section, I argue that according to Thomas's view of punishment, capital punishment is *not* necessary; where the penalty is useful to the common good and in accord with human custom, it is right to use it, but where it is not useful to the common good, and is not in accord with custom, it is wrong to use it.

I begin with a brief look at Thomas's teaching on human law (A). I then examine the Thomistic basis for the determination of specific punishments: first, the derivation of human law from natural law (B), and second, the determination of specific punishments through consideration of utility, equity, and custom (C). Finally, I apply these three elements of determination to the death penalty, showing how Aquinas's own treatment takes them into account. While these elements lead him to conclude that CP ought to be used, consideration of the same three elements in a different historical/social context may lead to a different conclusion.

B.1. Thomas on Human Law

In q. 90 of the *Prima secundae*, Thomas develops his famous definition of law in general is "an ordinance of reason for the common good, made by him who has care of

the community, and promulgated.”⁵¹ Reason is the first principle and the “rule and measure” of human acts. As to the first part of the definition, the first principle in matters of action is the end, because when we act, we are moved toward a certain end, and if there were no end preceding action, there would be no reason to act and therefore no action.⁵² The first principle is also the rule and measure of things in that genus.⁵³ And law is a specific act of the reason in a matter pertaining to action; thus, a law is called an ordinance of reason.

But human actions can be directed towards diverse ends, and we would not call all rulings of reason laws (for example, reason makes rulings within the exercise of a craft). What distinguishes law from other acts of reason is that it is directed to “the common benefit of the citizens,” says Thomas, quoting the 6th-7th century theologian and encyclopedist, Isidore of Seville.⁵⁴ Since laws are ordered to the common good, they must be ordered by the whole whose good is in question, or by someone who represents that whole. Thus law is made by one who has care for the community.⁵⁵ Finally, law, in order to be a rule and measure of human acts, must be applied to those whose actions are to be ruled by it. Therefore, the law must be promulgated in order to serve its purpose as law.⁵⁶

⁵¹ *S.T. I-II*, q. 90, a. 4.

⁵² *S.T. I-II*, q. 1, aa. 1, 2.

⁵³ *S.T. I-II*, q. 90, a. 1.

⁵⁴ *Etymologiae* V.3, quoted in *S.T. I-II*, q. 90, a. 2, s.c. While Isidore’s words apply to the political common good, Thomas is still speaking of law more generally here. Later he will treat human laws, which are directed to the specifically political common good.

⁵⁵ *S.T. I-II*, q. 90, a. 3.

⁵⁶ *S.T. I-II*, q. 90, a. 4.

As is well known, Thomas describes natural law as man's participation in the eternal law: "[The rational creature] has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law."⁵⁷ The precepts of natural law are the first principles of human action;⁵⁸ they direct us toward the good and away from the evil. The first precept of natural law, "good is to be done and pursued, and evil is to be avoided,"⁵⁹ has a role in the practical realm like the first indemonstrable principle in the speculative realm. In the speculative realm, there is no more basic principle than the principle based on being and non-being: "the same thing cannot be affirmed and denied at the same time." Other principles can be proved on the basis of this first principle, but the first principle itself is not susceptible of proof. Likewise, in the practical realm, there is no more basic precept than that based on good and evil. Other precepts of natural law can be traced back to this first precept (e.g., that one should not take innocent human life), which itself cannot be demonstrated.

In q. 95, a. 2, Thomas asks whether every human law is derived from natural law. He responds in the affirmative, saying that human law is derived from natural law, and "has just so much of the nature of law, as it is derived from the law of nature."⁶⁰ Human laws may be derived in two ways from natural law. The first is compared to the demonstration of conclusions from principles in the speculative sciences. The second is compared to the particularization of general forms in the arts. The examples Thomas uses

⁵⁷ Ibid., q. 91, a. 2.

⁵⁸ S.T. I-II, q. 94, a. 1, ad 2.

⁵⁹ S.T. I-II, q. 94, a. 2.

⁶⁰ S.T. I-II, q. 95, a. 2.

are felicitous for our purposes, since they deal with killing and with punishment. As an example of the first way of derivation, Thomas says that “one must not kill” is a conclusion that follows from the general principle “one should do harm to no man.”⁶¹ As an example of the second way of derivation, he says that from the general principle “the evil-doer should be punished,” specific punishments (“that he be punished in this or that way”) are derived by way of determination.⁶² Later in the *Treatise on Law*, he gives a name to precepts of law derived in the first way. These precepts “are called ‘moral’ precepts: since human morals are based on reason.”⁶³ Since they are based on reason, these *praecepta moralia* are universal. Thomas goes on to say that other precepts, “which derive their binding force, not from the very dictate of reason (because, considered in themselves, they do not imply an obligation of something due or undue) ... are certain determinations of the moral precepts.”⁶⁴ When these precepts have to do with man’s relation to his fellow man, they are called judicial precepts (*praecepta iudicialia*). These are not universal, as appears from Thomas’s replies to two of the objections in q. 95, a. 2.

The first objection cites Aristotle’s claim that human law (“the legal just”) is about things that are in themselves indifferent. Since things that come from the natural law are not indifferent, the objection concludes that human laws cannot all be derived from natural law.⁶⁵ But the objection fails to consider that human laws may be derived in more than one way from the natural law. Aristotle’s point about indifferent matters becoming law applies not to all human laws, but to “those enactments which are by way

⁶¹ *S.T.* I-II, q. 95, a. 2.

⁶² *Ibid.*

⁶³ *S.T.* I-II, q. 104, a. 1.

⁶⁴ *Ibid.*

⁶⁵ *S.T.* I-II, q. 95, a. 2, arg. 1.

of determination or specification of the precepts of the natural law.”⁶⁶ In specifying the natural law, human law may make something that was initially indifferent into a precept. For example, although Thomas argues that it is lawful for men to own property, he does not think that the natural law dictates how material goods are to be distributed in a particular society: “the division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law.”⁶⁷

In the third objection, the argument is made that since the natural law is the same for all, and human laws differ from place to place, human laws cannot all be derived from natural law. Thomas answers, “The general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people.”⁶⁸ We should expect that those things derived from the natural law as conclusions (like the prohibition of murder) will be found more universally among different peoples, while those things derived by way of determination will vary. Thomas does not exclude the possibility of variation from place to place regarding *praecepta moralia*, but he views them as aberrations—not specifications of a general principle.⁶⁹ Since punishment is a determination of natural law, different societies may determine different forms of punishment.

⁶⁶ Ibid., ad 1.

⁶⁷ *S.T.* I-II, q. 66, a. 2, ad 1.

⁶⁸ *S.T.* I-II, q. 95, a. 2, ad 3.

⁶⁹ Aquinas gives two examples: theft was not considered wrong among the Germans, as Julius Caesar notes, and “unnatural vices” were not considered wrong by some peoples, as St. Paul notes. *S.T.* I-II, q. 94, aa. 4, 6.

Judicial precepts, or determinations of the natural law, are mutable, as Thomas argues in q. 97. He cites the authority of Augustine, who says: “[*De Lib. Arb.* I.6] A temporal law, however just, may be justly changed in course of time.” Thomas suggests two causes for changing human law: the first has to do with man as a giver of law, since “it seems natural to human reason to advance gradually from the imperfect to the perfect,” whether in practical or in speculative matters.⁷⁰ In the realm of practical reason,

Those who first endeavored to discover something useful for the human community, not being able by themselves to take everything into consideration, set up certain institutions which were deficient in many ways; and these were changed by subsequent lawgivers who made institutions that might prove less frequently deficient in respect of the common advantage (*utilitas*).⁷¹

Human lawgivers always produce imperfect laws, which in time can be further perfected.

The second cause of a just change in human law is on the part of man as subject to the law:

On the part of man, whose acts are regulated by law, the law can be rightly changed on account of the changed condition of man, to whom different things are expedient according to the difference of his condition.⁷²

Thomas uses a passage from Augustine as an example for the second cause of change in human law. Augustine says that it is right for a moderate and responsible people, who make political decisions with the common good in mind, to be allowed to choose their rulers. On the other hand, if corruption abounds and the common good is ignored, the people forfeit their right to choose their rulers.⁷³ Thomas gives no example for the first cause, but we might supply one from his own century: this was the time when the trial by

⁷⁰ *S.T.* I-II, q. 97, a. 1.

⁷¹ *Ibid.*

⁷² *S.T.* I-II, q. 97, a. 1.

⁷³ Augustine, *De Lib. Arb.* I, c. 6, quoted in *S.T.* I-II, q. 97, a. 1.

ordeal, which had been popular in the early Middle Ages, was replaced by “rational proofs” of guilt or innocence.⁷⁴ Trial by ordeal, while better than no trial at all, was found to be deficient as an institution, and so lawgivers sought to replace it with something better.

One of the objections to the mutability of human law is that since a law, by essence, is just and right, and what is just and right is always just and right, laws should not be changed.⁷⁵ In response Thomas says that “right is predicated of law with reference to the common weal, to which one and the same thing is not always adapted ... wherefore rectitude of this kind is subject to change.”⁷⁶ A law that serves the common good at one time may not serve it at another.

While change in human law can be advantageous to a community, frequent changes would be disastrous, Aquinas warns:

Human law is rightly changed, in so far as such change is conducive to the common advantage. But, to a certain extent, the mere change of law is of itself prejudicial to the common good: because custom avails much for the observance of laws, seeing that what is done contrary to general custom, even in slight matters, is looked upon as grave. Consequently, when a law is changed, the binding power of the law is diminished, in so far as custom is concerned. Wherefore human law should never be changed, unless, in some way or other, the common good be compensated according to the extent of the harm done in this respect.⁷⁷

Thomas recognizes here that custom (*consuetudo*) is a great force in promoting obedience to law. Therefore, the benefit to be obtained or the evil to be avoided by a change in law must be compared to the diminution of custom that occurs with every change in law.

⁷⁴ See c. 1, p. 5.

⁷⁵ S.T. I-II, q. 97, a. 1, arg. 3.

⁷⁶ S.T. I-II, q. 97, a. 1, ad 3.

⁷⁷ S.T. I-II, q. 97, a. 2.

There are other kinds of force besides custom, but it is better when men obey the law because they are accustomed to do so, and not through fear of punishment. For the force of custom is present even when there is no fear of punishment. The common good is compensated for the negative effect that a change in law has, when there is some great and evident benefit to be obtained by the change, or when there is an evident or very harmful injustice in the law.⁷⁸ If only a small benefit is to be obtained or a small evil prevented, then it is unwise to change a long-standing precept.

Custom not only promotes obedience to written law, custom itself carries the weight of law, and may overrule written law. Thomas argues in a. 3 of q. 97 that human law, as an ordinance of human reason, may be manifested either by words or deeds. Reason manifested in words is written law and reason manifested in deeds is custom. Repeated external actions can make and change law; “Accordingly, custom has the force of a law, abolishes law, and is the interpreter of law.”⁷⁹

Yet custom, as an objection points out, “grows by the acts of private individuals,” and it is public authorities who have the power to legislate, not private individuals; “therefore custom cannot obtain force of law, so as to abolish the law.”⁸⁰ In response, Thomas argues that among free peoples, the real power to frame laws lies in the whole people, whose representative the ruler is. “Wherefore although each individual cannot make laws, the whole people can.”⁸¹ Even among a people who are not free, “a prevailing custom obtains force of law, in so far as it is tolerated by those to whom it

⁷⁸ *S.T. I-II*, q. 97, a. 2.

⁷⁹ *S.T. I-II*, q. 97, a. 3.

⁸⁰ *Ibid.*, arg. 3.

⁸¹ *S.T. I-II*, q. 97, a. 3, ad 3.

belongs to make laws for that people.”⁸² Of course, this assumes that the custom does not violate a higher law, for if the custom contradicts one of the precepts of natural law, Thomas does not hesitate to declare it evil, and says that in this case, custom must yield to authority.⁸³ But as long as custom does not violate natural law, it may (and ought to) influence written law.

What is most striking about Thomas’s discussion of custom is that he understands custom to be something *rational*. In his view, custom is not unthinking submission to what has always been done; it is a declaration of reason in deed. The fact that an act is customary does not make it less rational. It also proceeds from a “deliberate judgment of reason,” even if the reason is not original.⁸⁴ A deliberate act that proceeds from habit, as long as it is in accord with reason, is a rational act, and in a sense it is more rational, because it follows reason more easily and swiftly.

Custom is one of the external forces that promotes the formation of virtue in those who are subject to it. In the Aristotelian-Thomistic view, moral virtues come to be through a process of habituation. The formation of virtue, Aristotle says, has three causes, “There are three things which make men good and virtuous; these are nature, habit, rational principle.”⁸⁵ As James Bernard Murphy points out, there is a hierarchy among these three elements: custom and habit build on nature, and (practical) reason builds on custom and habit.⁸⁶ Nature is the fundamental requirement: the natural powers of reason

⁸² *S.T.* I-II, q. 97, a. 3, ad 3.

⁸³ *S.T.* I-II, q. 97, a. 3, ad 1.

⁸⁴ *S.T.* I-II, q. 97, a. 3.

⁸⁵ *Politics* VII.13.1332a39. See also *Politics* VII.15.1334b7-10.

⁸⁶ “Nature, Custom, and Reason as the Explanatory and Practical Principles of Aristotelian Political Science,” 477.

and sensation and the appetites associated with those powers, but also whatever natural dispositions the individual has, which make it easier for him to acquire virtue.⁸⁷ But man does not possess moral virtues by nature, though neither are they opposed to nature; “Rather, we are by nature able to acquire them, and we are completed through habit.”⁸⁸

Yet “the soul of the student needs to have been prepared by habits for enjoying and hating finely, like ground that is to nourish seed.”⁸⁹ Some of this preparation is done within the family, but good laws and good social customs contribute much to the formation of good habits of character:

For this reason the rearing of children and their activities must be regulated by good laws; thus they will be forced, as it were, to become accustomed to good things which will not be distasteful but pleasant after the habit has been formed.... He says that it is not enough for young men to be reared under good laws and to be well taken care of, but even more, adults must discover honorable ways to act and become accustomed to them.⁹⁰

Moral virtues come to be through repetition (one becomes just through doing just actions), so that virtuous acts become natural, as it were.

But moral virtue is derived from customary activity. Now moral virtue, found in the appetitive part, implies a certain inclination to something desirable. This inclination is either from nature, which tends to what is agreeable to itself, or from custom, which is transformed into nature.⁹¹

In one sense, then, custom precedes reason. The person who is trained by good customs is prepared to acquire virtue. Aristotle says of the virtuous man, “First, he must know [that

⁸⁷ *Ethics* X.9.1179b21: “The contribution of nature [to becoming good] clearly is not up to us, but results from some divine cause in those who have it, who are the truly fortunate ones.” A few lines later, Aristotle says that one who “lacks the right nature” must be compelled by punishment to do what is fine. X.9.1180a10.

⁸⁸ *Ethics* II.1.1103a20-25.

⁸⁹ *Ethics* X.9.1179b25.

⁹⁰ *In X Ethic.* lect. 14, nn. 2149, 2150.

⁹¹ *In II Ethic.*, lect. 1, n. 247.

he is doing virtuous actions]; second, he must decide on them, and decide on them for themselves; and, third, he must also do them from a firm and unchanging state.”⁹²

In another sense, however, custom is an expression of (practical) reason. Customs will only promote virtue when they are in accord with reason, which requires that they be formed by those who already possess virtue. For the mean in virtue is determined as the prudent man would decide it.⁹³ Customs formed by the repeated actions of rational agents are rational. Custom in this sense is an expression of reason, and interprets and changes law. Of course, custom does not change moral precepts (those derived as conclusions from natural law), but only judicial precepts (determinations of natural law). It is not that virtue itself means something different, or that the prudent man in one society would be an entirely different kind of man than the prudent man in another society. Rather, the prudent man would not make the same determination of a particular law in every situation. Moral law requires, for example, that one use money well (the virtue of liberality).⁹⁴ But as to how much money one gives, and to whom, this will be determined differently in each situation—not randomly, but in response to particulars and in conformity with custom.

In summary, human law contains two kinds of precepts: moral precepts and judicial precepts. Moral precepts are derived from natural law as conclusions from premises. Moral precepts are universal; they apply to all societies. Judicial precepts are derived from natural law as determinations of more general principles. These are

⁹² *Ethics* II.4.1105a32-35.

⁹³ *Ethics* II.6.1107a1-2: “Virtue, then, is a state that decides, consisting in a mean, the mean relative to us, which is defined by reference to reason, that is to say, to the reason by reference to which the prudent person would define it.”

⁹⁴ See *S.T.* II-II q. 117.

particular precepts, and they will vary according to custom. Precepts about specific punishments belong to the second class of precepts.

B.2. Utility, Equity, and Custom Determine Specific Punishments

We have seen that law about punishment is the kind of human law derived by way of determination or specification from the natural law. For Thomas, the fitting of punishment to crime is not determined simply from the law of nature; nor is it given by divine command (in the New Law, that is). The determination of punishment is an exercise of political prudence. The person who possesses the virtue of justice and the virtue of political prudence judges rightly about matters pertaining to the political order, for “to decide rightly about virtuous deeds proceeds, properly speaking, from the habit of virtue (*ex habitu virtutis*) ... Therefore judgment, which denotes a right decision about what is just, belongs properly to justice.”⁹⁵ But this judgment cannot be made in the abstract; it occurs when the just person comes into contact with certain particulars. Prudence must take particulars into account, since “actions are in singular matters: and so it is necessary for the prudent man to know both the universal principles of reason, and the singulars about which actions are concerned.”⁹⁶ In determining civil punishments, one must know not only the general principle that evil ought to be punished, but singulars such as the severity of the specific crime, the range of punishments available, the customs of the place, and the possible consequences of various penalties. Such particulars are

⁹⁵ *S.T. II-II*, q. 60, a. 1. See also *Commentary of Saint Paul’s First Letter to the Thessalonians and the Letter to the Philippians, Aquinas Scripture Series*, vol. 3, trans. F. R. Larcher and Michael Duffy (Albany, NY: Magi Books, 1969), *Super Philip*.1-2.

⁹⁶ *S.T. II-II*, q. 47, a. 3.

infinite, and cannot all be known, but this does not prevent the prudent man from judging. It means that “our counsels are uncertain (Wis. 9:14). Nevertheless experience reduces the infinity of singulars to a certain finite number which occur in many cases (*in pluribus accident*), and the knowledge of these suffices for human prudence.”⁹⁷

Thomas gives three kinds of particulars that the prudent man considers in determining punishments: equality, utility, and custom. In order to avoid misunderstanding, we must keep in mind that these considerations presuppose that *some* punishment is already justified; it is merely a question of which punishment to use. Thomas mentions two considerations in the following passage, taken from a question on the punishment of sacrilege:

In the award of punishments two points must be considered. First *equality*, in order that the punishment may be just, and that “by what things a man sinneth by the same . . . he may be tormented” (Wisdom 11:17).... The second point to be considered is *utility*. For punishments are inflicted as medicines, that men being deterred thereby may desist from sin.⁹⁸

The first consideration is equality between offense and punishment. This equality is the numerical equality of commutative justice. By punishing, the judge seeks to restore what was lost to the victim of a crime, and to take away what was gained by the wrongdoer:

[Aristotle] says that if one of two contestants receives a wound and the other inflicts it, or even if one commits murder and the other is murdered, this division of action and passion brings about inequality because the assailant and the murderer have more of what is esteemed good, inasmuch as they have done their own will and so seem as it were to have gained. But the man who is wounded or murdered has more of evil insofar as he is deprived against his will of well-being or life, and so he seems as it were to have suffered loss. The judge tries to equalize this by subtracting from the gain and allotting compensation for the loss, inasmuch as he takes away something from the assailant and the murderer

⁹⁷ S.T. II-II, q. 47, a. 3, ad 2.

⁹⁸ S.T. II-II q. 99, a. 4. Emphasis mine.

contrary to their will and bestows it to the gain or honor of the person wounded or murdered.⁹⁹

Following Aristotle, Thomas speaks here of equality between offenses and punishments.

One might question the legitimacy of comparing offenses and punishments in this way.

One can only compare things in the same genus,¹⁰⁰ and so perhaps it makes no more sense to speak of equality between crime and punishment than it does to speak of equality between colors and sounds.

But what exactly is Thomas comparing when he talks about inequality and equality in this passage? There are two comparisons: a comparison of two evils: the loss suffered by the victim and the loss suffered by the one being punished; and a comparison of two goods: the goods taken by the offender and the goods restored by judge. The offense produces an inequality because the offender has “more of what is esteemed good,” while the offended party “has more of evil.” Punishment and restitution aim at righting this inequality. Restitution does so by giving to the offended party a good comparable to the good taken by the offender. Punishment does so by inflicting an evil on the offender comparable to the evil he inflicted.

Equality of punishment does not take into account the identity of the offender or the one offended, except insofar as this bears on the severity of the injury itself. For example, striking one’s father is a more serious injury than striking a stranger.¹⁰¹ In

⁹⁹ *In V Ethic.*, lect. 6, n. 952.

¹⁰⁰ *S.T. I*, q. 6, a. 2, ad 3.

¹⁰¹ *S.T. II-II*, q. 63, a. 4, ad 2.

general, however, “[t]he law takes into account only the nature of the injury, so that the man who has done more damage, whatever his condition, must make more restitution.”¹⁰²

The second consideration in determining punishments is utility, that is, the degree to which a punishment serves the remote ends of punishment: the reform of the offender, the protection of society, the deterrence of others from crime. In the passage cited above (*S.T.* II-II q. 99, a. 4), Thomas mentions the end of deterrence. Deterrence and the other remote ends of punishment are not things achieved in punishing itself, but by means of the punishment. Nor do they justify punishment in itself, but rather the determination of particular punishments.

We can imagine cases where equality and utility might come into conflict. Thomas envisions a case in which a king has committed a serious wrong. Equality suggests that the king be punished severely, in accord with the severity of his crime. Utility suggests that punishment be forgone for the sake of the common good, to avoid scandal and disorder. In this conflict, Thomas sides with utility. The more reasonable choice, he says, would be to forgo punishment for the sake of civil order, i.e., for the common good. To prefer utility is reasonable in light of the object of punishment, which is to redress disorder. In this case, punishment would create more disorder than it redressed. The order the punishment achieves is part of the order that constitutes the political common good. They are not two different orders, but all part of the just order that defines the community and allows its members to flourish.

¹⁰² *In V Ethic.*, lect. 6, n. 951.

The third requirement in determining specific punishments is human custom. The first two considerations, utility and equality, depend simply on the order of reason, but human discipline, which is encouraged and upheld by human laws, depends not only on the order of reason, but also on the state of the human agent.¹⁰³ That is, human laws, as dictates of reason, must take into account the state of the subjects to which these dictates are given. This is done by making determinations that accord with human custom. This requirement can be found in Thomas's discussion of vengeance (*S.T.* II-II, q. 108), where he argues that vengeance should be wrought by means of punishments customary among men. In the *sed contra* he cites the authority of the divine law, which makes use of punishments of this sort.¹⁰⁴ When the Old Law was given to Moses, it made use of punishments that were customary for the time: fines, beatings, death, etc.¹⁰⁵ Human lawgivers do the same thing, in using customary punishments to enforce the laws they make. It should not surprise us to find Thomas approving the use of customary punishments, given his agreement with Isidore of Seville, who says that law should be "according to the customs of the country," and "adapted to place and time."¹⁰⁶

Custom is determined by the repeated acts of private persons (*S.T.* I-II, q. 97, a. 3). Private persons do not determine punishments directly, but they exert indirect influence on such determinations, precisely through the force of custom (i.e., communally). For example, private persons may influence punishment by encouraging

¹⁰³ "For human discipline depends first on the order of reason ... secondly, it depends on the ability of the agent; because discipline should be adapted to each one according to his ability ... and should be according to human customs; since man cannot live alone in society, paying no heed to others." *S.T.* I-II q. 95, a. 3.

¹⁰⁴ "These punishments are fixed by the divine law as appears from what we have said above [I-II, q. 105, a. 2]." *S.T.* II-II, q. 108, a. 3, s.c.

¹⁰⁵ See *S.T.* I-II, q. 105, a. 2.

¹⁰⁶ Isidore, *Etymologiae* V.21, quoted in *S.T.* I-II, q. 95, a. 3.

judges to sentence more leniently. Augustine¹⁰⁷ in the fourth century and John Paul II¹⁰⁸ in the twentieth have both used this strategy with regard to the death penalty. This kind of influence may well affect custom. Thomas's logic dictates that if it can be determined that custom has changed with regard to the use of a particular punishment, it is right that the law be changed, assuming always that the custom does not violate natural law. Elsewhere, Thomas emphasizes the importance of custom in the formation of human law, which "should be adapted to each one according to his ability ... and should be according to human customs; since man cannot live alone in society, paying no heed to others."¹⁰⁹

We have seen that in determining specific punishments, the prudent lawgiver will consider the equality, utility, and custom of any proposed punishment. When these features come into conflict, utility takes precedence over equality. Custom is a necessary foundation, presupposed by the other considerations, since in choosing equitable and useful punishments, lawmakers choose from the range of customary penalties. The political common good unites all of these considerations, as the end which civil punishment seeks.

B.3. Determining the Death Penalty

¹⁰⁷ "But, I ask you that the punishment of the crimes, however great, which they have confessed, may be something short of death, and I ask it for the sake of my own conscience, as well as to give an example of Catholic moderation." Augustine, Letter 139 (A.D. 412) to Marcellinus, in *The Fathers of the Church: Saint Augustine, Letters, Volume III (131-164)*, translated by Sister Wilfrid Parsons, S.N.D. (Washington, D.C.: Catholic University of America Press, 1965).

¹⁰⁸ "It is well-known that Pope John Paul II has personally intervened on numerous occasions to appeal for clemency for individuals sentenced to death. He has appealed for a moratorium on recourse to the death penalty, at least on the occasion of the forthcoming Jubilee Year." Archbishop Renato R. Martino, "Abolition of the Death Penalty."

¹⁰⁹ *S.T. I-II*, q. 95, a. 3.

For the most part, Thomas does not consider determinations of specific punishments in his own time. However, he does consider the specific punishments used in Mosaic Law in his *Treatise on Law*. Thomas divides the Old Law into three parts: moral, ceremonial, and judicial precepts. The moral precepts are reducible to the Decalogue, and these are “dictated by the natural law,” i.e. derived as conclusions from principles of the natural law.¹¹⁰ The ceremonial precepts are “determinations of the divine worship,” and the judicial precepts are “determinations of the justice to be maintained among men.”¹¹¹ The judicial precepts play the same role that human law would play in other societies, regulating relations between men, whether between one Israelite and another (laws about lending, property rights, and punishments), between the Israelites and foreigners (laws about aliens and enemies), and between the members of a household (laws about wives, slaves, and children).¹¹²

The priestly laws of ancient Israel prescribed the punishment called *kareth* (excising) for about three dozen offenses. While this could mean exile or death, “many offenses punished by *kareth* are elsewhere in the priestly law punished [explicitly] by death ... [and] it thus appears that a death penalty, rather than banishment or excommunication, as has been supposed, is involved.”¹¹³ Some of the crimes which merited “excision” were murder, sorcery, necromancy, idol-worship, blasphemy, adultery, incest, sodomy, bestiality, and cursing of parents.¹¹⁴ Offenses aimed directly at

¹¹⁰ S.T. I-II, q. 99, a. 4.

¹¹¹ Ibid.

¹¹² S.T. I-II, q. 105.

¹¹³ *The Interpreter's Dictionary of the Bible*, s.v. “Crimes and Punishments.”

¹¹⁴ Ex 22:17-19; Lev 20:2-17, 27; 24:16-17; Deut. 17:2-6.

God (especially idol-worship) threatened the public good, and an obligation was imposed on the witness and on the entire community to punish the offender, usually by stoning.¹¹⁵

If there is found among you, within any of the towns which the Lord your God is giving you, a man or woman who does what is evil in the sight of the Lord your God, in transgressing his covenant, and has gone and served other gods and worshiped them, ... then you shall bring forth to your gates that man or woman who has done this evil thing, and you shall stone that man or woman to death with stones. (Deut. 17:2-6)

Crimes against one's fellow man were punished by the offended party or his relatives.

For example, it was the duty of a husband to prosecute his adulterous wife, and the duty of the kinsman (the "Avenger of Blood") to prosecute his relative's murderer.¹¹⁶ For most injurious crimes, a fine could be substituted for the punishment of death, if acceptable to the prosecutor, but the life of the murderer was not subject to ransom. "This prohibition of compensation for murder is unparalleled among the laws of the ancient Near East ... it is the legal expression of the sanctity of human life expressed in Gen. 9:6b": "for God made man in his own image."¹¹⁷

The shedding of human blood was a particularly serious crime, for blood represented the very life of a creature. Even taking non-human life carried certain conditions. While the legitimacy of killing beasts was never questioned, it was done with divine permission, since it is God, the giver of life, who has authority also to take life. Therefore, there were specific regulations concerning the slaughter of animals. Naturally, the laws regarding the taking of human life were even stricter. The offender had to be convicted of a grave violation of the law, by two or more witnesses. The punishment of

¹¹⁵ *Interpreter's Dictionary of the Bible*, s.v. "Crimes and Punishments."

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* See also *Jewish Study Bible*, note on Exod. 21:12-14.

death was to purge the people of the “bloodguilt” that was incurred by the crime (particularly a crime that involved the spilling of human blood), and to help right the injured relationship of the people to God.¹¹⁸

While to us, the penal code of ancient Israel seems harsh, historians tell us that the practice of blood vengeance was customary at the time, and that in fact Israel’s law was significantly less harsh than the penal codes of other ancient peoples. In Israel’s contemporaries, familial and tribal loyalties demanded a vengeance of blood when a family or clan-member had been killed. It was not necessary to identify the killer, much less to produce several witnesses; the idea was simply to take revenge on the killer’s family or clan, nor was the revenge limited to a life for a life. Thus the *lex talionis* of Deut. 19:21 should be taken as a limiting rule: you may take *only* a life for a life, an eye for an eye, etc. For Israel, punishment was demanded not by clan loyalties, but by the Lord of Life.¹¹⁹ CP was imposed for murder, regardless of the identity of the victim; even the murder of a slave was punishable by death. Nor could the wealthy murderer bargain for his life by substituting a fine as punishment for a murder.¹²⁰ Israel’s penal law used punishments that were already customary at the time, but exercised them with greater equality.

The judicial precepts of Mosaic Law, Thomas notes, “derive their binding force not from reason alone, but in virtue of their institution.”¹²¹ This distinguishes them from the moral precepts, which are binding on all men. Thomas defends the judicial

¹¹⁸ Bailey, *Capital Punishment: what the Bible says*, 31-37.

¹¹⁹ Ibid., 37.

¹²⁰ Bailey, 30.

¹²¹ *S.T. I-II*, q. 104, a. 1.

prescriptions of the Mosaic Law as good, for the time in which they were valid, including the prescriptions for capital punishment.¹²² On the other hand, he does not view the catalogue of capital crimes as perpetually binding. The judicial precepts lose their binding force with the coming of Christ, because when the state of the people changes, the laws governing them must change as well.¹²³ With the coming of Christ, there was a change in the state of the people, since in the community of the Church there was to be no distinction between Jew and Greek, as St. Paul says (Gal 3:28). Therefore, the judicial precepts were no longer in force.¹²⁴ Under the New Law, there are no prescriptions at all for civil punishments. For judicial precepts “are not essential to virtue in respect of any particular determination, but only in regard to the common notion of justice.”¹²⁵ Therefore, the New Law leaves it to civil authorities to specify precepts relating one man to another, including the prescription of specific punishments.

We know that CP was in use when Thomas wrote, but he does not give contemporary examples of precepts relating to this penalty. From other sources, however, we may gather an idea of its extent. There was no prison system as we know it today. There were places of confinement, but these were used mostly to remand defendants and to detain those awaiting execution or other punishment.¹²⁶ The idea of using imprisonment itself as a punishment was opposed to a principle inherited from Roman law through the late-Roman jurist Ulpian (d. 222/224 AD):

¹²² *S.T. I-II*, q. 105, a. 2, ad 10.

¹²³ *S.T. I-II*, q. 104, a. 3, ad 2. See also *S.T. I-II*, q. 97, a. 1.

¹²⁴ *S.T. I-II*, q. 104, a. 3, ad 2.

¹²⁵ *S.T. I-II*, q. 108, a. 2, ad 4.

¹²⁶ Edward M. Peters, “Prison Before the Prison: The Ancient and Medieval Worlds,” in *Oxford History of the Prison: The Practice of Punishment in Western Society*, 21.

In the Roman law that guided much of the law learning and lawmaking in thirteenth-century Italy, Ulpian's statement that prisons should be used for confinement, not for punishment, was generally understood to be the formal doctrine on the subject. In other learned law, however, notably canon law, prisons were certainly used for both punishment and correction.¹²⁷

Mediaeval monasteries typically had a prison cell for the punishment of monks or nuns for violations of their monastic rule. Canon law also provided for confinement in a monastery as a punishment for clerics and lay people. Moreover, because mediaeval courts gave much discretion in punishing to individual judges, Ulpian's principle does not seem to have prevented prisons from sometimes being used as places of punishment, and indeed, this practice had become more common in some places by the thirteenth century.¹²⁸ Nonetheless, imprisonment was one of the less common forms of punishment in the Middle Ages; nor were facilities constructed exclusively for this use, as they are today. Instead, the most common Mediaeval punishments, according to *The Oxford History of the Prison*, were mutilation, death, exile, and monetary compensation.¹²⁹

A broader list can be found in St. Thomas, who divides customary punishments into eight categories: death, stripes, retaliation (an eye for an eye), slavery, imprisonment, exile, fines, and ignominy (public defamation).¹³⁰ Thomas considers death to be the severest of these punishments, because it is the deprivation of the greatest of those goods that can be taken away by human power. Fines and ignominy deprive one of external goods; slavery and imprisonment deprive one of bodily liberty; stripes and retaliation

¹²⁷ Ibid., 43.

¹²⁸ "In both Venice and Florence the increased use of punitive punishment suggests that imprisonment represented a major aspect of the legal revolution that had begun in the twelfth and thirteenth centuries." Peters, 43.

¹²⁹ Peters, 33.

¹³⁰ *S.T. II-II*, q. 108, a. 3. He takes this classification from Augustine (*D.CD. XXI*, c. 11), who cites the authority of Cicero.

deprive one of bodily integrity. Exile and death both deprive one of life in the community, but death does with greater completeness and finality.¹³¹

The sentence of death took a variety of forms in the Middle Ages, and the specific form depended on the nature of the crime, the place, and the discretion of the judge. Among the Anglo-Saxons, one guilty of homicide might be bound to the corpse of his victim and buried alive.¹³² Death by hanging was reserved for royalty, and did not become the standard mode of administering death until the seventeenth century.¹³³ In German lands, “custom dictated both procedure and punishment. Nobles were beheaded, and serious offenders of lower social status were broken on the wheel, burned, or hanged. These forms of shameful execution [were] often accompanied by mutilation.”¹³⁴ A nineteenth century review of modes of capital punishment in the Middle Ages details several other forms of execution: “By the laws of the Burgundians, the adulterous woman was smothered in mud. Grimm informs us that the punishment of drowning was awarded especially to women and sorceresses.”¹³⁵ Burning became the accepted sentence for heretics in the thirteenth century. The diversity in modes of execution corresponds to a diversity of crimes. Murder was not the only crime punishable by death in the Middle

¹³¹ *S.T. II-II*, q. 108, a. 3.

¹³² An edict of Richard I, particular to those on a crusade to the Holy Land, dictated that one who killed another at sea was to be thrown overboard, bound to his victim’s corpse, and one who slew another on land was to be buried alive, again bound to the corpse of his victim. In Sandwich, there is evidence that thieves were also buried alive. Akerman, “‘Furca et fossa’: a review of certain modes of capital punishment in the Middle Ages; communicated to the Society of Antiquaries,” 3.

¹³³ The case was similar in France. Akerman, 5.

¹³⁴ Peters, 37.

¹³⁵ Akerman, 2.

Ages; theft, forgery, adultery, assault on a king, sacrilege, and heresy were also capital crimes.¹³⁶

Capital punishment was generally accepted by Mediaeval theologians as a licit form of punishment. There were a few exceptions, “for example Duns Scotus teaches that it is never licit to kill a man, and only those may be killed whom God excepts in the law.”¹³⁷ But in general, those who dealt with CP as a disputed question (such as Peter Lombard), defended its practice. In his own defense of the death penalty, Thomas does not attempt to prescribe which offenses should be punished with death. When he does refer to execution for a specific offence, he does so by way of example, or in order to remove a specific difficulty, as in the question on punishment of heretics.¹³⁸ If asked when death should be used as a punishment, he might direct us to the *Corpus iuris civilis*, for in his view it is the task of civil authorities to choose punishments, taking into account what is customary, not unquestioningly, but with a view to the common good.

In reference to equality, Thomas says that the person who acts against the political community itself may be deprived of the good of association in the political community:

Natural equity seems to demand that each person be deprived of the good against which he acts, for by this action he renders himself unworthy of such a good. So it is that, according to civil justice, he who offends against the state is deprived completely of association with the state, either by death or by perpetual exile.¹³⁹

As we have seen, Thomas also considers the utility of the death penalty:

¹³⁶ Not every instance of these crimes was punished by death; the list simply asserts that these crimes were, in some places, capital crimes.

¹³⁷ George Quentin Friel, “Punishment in the Philosophy of Saint Thomas and Among Some Primitive Peoples,” 37. See Duns Scotus, *Comment. in Sent. Petris Lombardi*, IV Sent., dist. 15, q. 2, a. 3.

¹³⁸ S.T. II-II, q. 11, aa. 3, 4.

¹³⁹ S.C.G. III, c. 144, n. 4.

[Evil persons] may be justly executed, for the danger which threatens from their way of life is greater and more certain than the good which may be expected from their improvement.¹⁴⁰

The main concern in the decision to execute is the danger which the evildoer presents to the common good. In some cases, the good to be served by executing is not only greater (because common) but more certain (because the amendment of the evildoer is unlikely). Yet the latter consideration is always secondary to the common good, for Aquinas; those in civil authority are obliged to consider the common good above private goods. If authority must choose between acting to improve the individual (an uncertain end, in any case) and acting to protect the common good, it should choose the latter. It would be rash to assume, however, that *every* punishment involves a choice between the good of the community and the good of the offender. One and the same punishment may serve both the good of the criminal and the common good. Thomas even suggests, as we have seen, that the death penalty can do this, in that it at least prevents the criminal from doing more evil.¹⁴¹

As for custom, the death penalty was well-established and regularly used in 13th century Europe. To do away with CP would have meant major changes in the law and its implementation, and so there would have to have been a strong reason to change.

Thomas's presupposition is always against changing the law, because "when a law is changed, the binding power of the law is diminished, in so far as custom is abolished."¹⁴²

In order to justify changing law, there must be some great benefit to be obtained or

¹⁴⁰ S.C.G. III, c. 146, n. 10.

¹⁴¹ S.T. II-II, q. 25, a. 6, ad 2.

¹⁴² S.T. I-II, q. 97, a. 2.

injustice to be avoided. However, when custom changes in regard to a specific punishment, it is right to treat this custom as law, and to change the written law accordingly. Thomas evidently saw no such reason. He understood this customary punishment to have a rational basis, and not to violate the natural law. Therefore, objections to the death penalty were easily answered. It is necessary to emphasize that Thomas's support of the customary punishments of his time was not an *unreasonable* support, because he understood custom itself as an expression of reason. He sought to articulate the reason inherent in such custom, without maintaining that custom was infallible.

In ancient Israel and in 13th century Europe, the death penalty was a useful, equitable, and customary punishment. However, utility, equity, and custom will not prescribe the same thing to every time and place. If the death penalty is no longer useful or customary, and if there are alternative punishments that would also be proportional to serious offenses, Thomas's theory of punishment would reject its use. Judicial precepts, Thomas writes in his commentary on the New Law, "are not essential to virtue in respect of any particular determination, but only in regard to the common notion of justice."¹⁴³ Positive precepts, that is, are not necessary conclusions from the natural law. According to natural law's "common notion of justice," what is necessary is that evil be punished, and that the punishment be useful, equitable, and in accord with custom. It is not necessary that each society prescribe the same penalties.¹⁴⁴ It is not necessary for any particular class of crimes to be punished with death. For "the obligation of observing

¹⁴³ S.T. I-II, q. 108, a. 2, ad 4.

¹⁴⁴ See S.T. I-II, q. 95, a. 2.

justice is indeed perpetual. But the determination of those things that are just, according to human or Divine institution, must needs be different, according to the different states of mankind.”¹⁴⁵

In this section, we saw how Thomas regarded the death penalty as a political institution. Punishments, in general, are determinations or particularizations of the natural law precept that punishment is due to evil. In making specific determinations of this kind, one ought to consider what is equitable or proportional to the evil that has been committed. One ought also to consider what punishment will be most useful to the good of the community. Finally, one ought to choose from among those punishments that are customary to a particular time and place. Considering all these factors, CP was a reasonable penalty to use in the thirteenth century. Today, however, different conditions obtain, and one who would reason well about CP must judge according to these new circumstances.

C Conclusion

We have seen that according to Thomas, CP is a legitimate form of civil punishment, but it is not in itself necessary to good social order. It is just for political authority to execute offenders, when there is nothing else that can be done for the good of the community. CP may be conditionally necessary—that is, if nothing else will serve the common good—but it is not necessary in an absolute sense.

¹⁴⁵ *S.T.* I-II, q. 104, a. 3, ad 1.

Essential to this thesis is the idea that CP does not violate a moral law (either natural or divine). Thus, I showed how Thomas distinguishes CP from murder. In his view, intentional killing is morally specified by the circumstances *who* (the agent) and *to whom* (the receiver). As for divine commands, the 5th Commandment prohibits intentional killing by one's own authority, but not killing as punishment. The love that we should have for all men does not rule out punishment, when that punishment is done for the good of others and not out of hatred.

Having argued that executing a man is not evil per se, Thomas can then show how CP may sometimes be conducive to the common good by curbing or restricting evil in some way. Whether CP will do this in a particular circumstance is a determination of practical reason. For Aquinas, the determination of specific civil punishments is directed toward the common good, and depends on three considerations: utility (the benefit to be obtained for the common good), equality (making the punishment proportionate to the offense), and custom (what punishments are approved by custom in a certain time and place).

We have seen how equality and how custom determine punishment, but the question of utility requires further exploration. Thomas's theory requires the judge or lawgiver to consider what will most benefit the common in determining punishment. Depending on what view he takes of the common good, this could produce significantly different results. If, for example, the common good is the sum of individual goods, then it is difficult to see how punishment contributes to the common good at all, since it inflicts an evil on one of those individuals, and does not clearly add to the good of others. On the

other hand, if the common good is the material prosperity of the state, then it will make sense to punish a homeless man more severely than a successful businessman for the same offense, since one is a drain on the common good and the other contributes to it. It should come as no surprise that Thomas takes neither of these views of the common good. In Chapter III, we will see that for Thomas, the political common good is the just and peaceful order of civil society, which punishment serves immediately by redressing disorder, and remotely by discouraging future disorder.

Chapter III: The Political Common Good According to St. Thomas

It may be difficult to say in what respects a man is, and in what respects he is not, a part of the community. What is not open to doubt is that insofar as the individual has the character of a part, the principle of the primacy of the whole signifies not only that the common good is greater, but also that the private good may have to be sacrificed to the greater good of the community. Remarkably, these views command a large amount of consensus so long as they remain unformulated. It is generally agreed that members of the police or of the armed forces or of the fire department are sometimes under strict obligation to expose themselves to probable, or almost certain, or humanly certain death in the service of the community. Disagreements begin when such principles as that of the primacy of the common good are formulated.¹

It is not difficult to recognize the nobility of individual actions that serve the good of a community at the sacrifice of an individual good: the fireman who risks his life to put out a dangerous fire, the soldier in wartime, the mother who sacrifices a promising career to care for her children. It is more difficult to explain what justifies the sacrifice of an individual good for the common good. We are rightly wary of attempts to impose such sacrifices, or to make individuals mere instruments of the state. Yet if the common good is not superior to the individual good, why should we acclaim those who are willing to sacrifice their own good for the good of the community?

The relationship between individual and common goods is essential to our consideration of capital punishment. Thomas's assertion that a criminal may rightly be executed to serve the common good is based on the priority of the common good. In this chapter, I consider the principle of the priority of the common good and its application to the realm of political society. I will consider the principle of the preeminence of the common good, using the works of Thomas (especially the *Summa Theologiae* and his

¹ Yves Simon, *The Tradition of Natural Law*, 91-92.

commentaries on Aristotle) and Aristotle (especially the *Nicomachean Ethics* and the *Politics*).² In the first part of this chapter, I consider what kind of community Thomas means when he speaks of the priority of the common good (A). Since the foundation for the priority of the common good is the more general principle of the priority of the whole over the part, I devote the next section to what it means to call the political community a whole, and citizens parts of that whole (B). The next section treats the notion of the common good itself (C). Finally, I consider the specifically political common good: what it is, in what sense it is prior, and how this is compatible with individuals' pursuit of their own goods (D).

A The Political Community

Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.³

Aristotle begins his *Politics* with these words about the primacy of the political community. The state is the highest kind of community and it aims at the highest good. Each community seeks some good, and the good defines and specifies each community. The political community aims not only at the good of a few, or at one particular good such as wealth, but at the good life for all its members.

² My main concern is with Thomas's position, rather than with the accuracy of his interpretation of Aristotle.

³ *Politics* I.1.1252a 1-6.

Aristotle does not immediately say what this highest good is, but after the passage cited above, he begins to consider the source of the political community, since “he who thus considers things in their first growth and origin, whether a state or anything else, will obtain the clearest view of them.”⁴ Moreover, in looking to the source, we will see the reason for the formation of the community, the good for which it is formed and at which it aims. “In the first place there must be a union of those who cannot exist without each other; namely, of male and female, that the race may continue.”⁵ The association that forms the family is the most basic and natural of human associations, and provides “for the supply of men’s everyday wants.”⁶ Since a single household is not self-sufficient, families naturally join together and form villages. From several villages joined together, a state is formed.

If households and villages are natural, Aristotle reasons, so is the state, for the state is the end and goal of the process, and “the end of the natural sources from which something comes to be is the thing’s nature.”⁷ In other words, the aim of human association is the satisfaction of human needs. The self-sufficient society is the one that provides for all human needs (as far as any human society can), and this is the state. The state, therefore, is the end of the natural activity of human association, and as the end of a natural activity, the state is itself natural.

If we consider the state from the perspective of the human need for political association, we again arrive at the conclusion that the state is natural. That man is a

⁴ *Politics* I.1.1252a 24f.

⁵ *Politics* I.1.1252a 26f.

⁶ *Politics* I.2: 1252b 12. See also *Ethics* VIII.12.

⁷ *In I Polit.*, c. 1, n. 18. See also *Politics* I.2.

political animal is shown by the human capacity for language, which is ordered to communication about the harmful and the useful, the just and the unjust, “but communication about these things produces the household and the political community. Therefore, human beings are by nature domestic and political animals.”⁸ In his *Commentary on the Politics*, “Aquinas accentuates Aristotle’s argument that human beings are naturally political over the Philosopher’s prior argument that the city exists by nature, as the natural outgrowth and end of prior natural associations.”⁹ The two arguments are not mutually exclusive, but differ in that the former focuses on political activity (communication about good and evil, just and unjust), and the latter on the existence of a political order.

Aristotle asserts that while the joining of men and women as couples is more natural and more necessary than political association, the state is prior to the family:

The state is by nature clearly prior to the family and to the individual, since the whole is of necessity prior to the part; for example, if the whole body be destroyed, there will be no foot or hand, except in an equivocal sense, as we might speak of a stone hand; for when destroyed the hand will be no better than that ... The proof that the state is ... prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole.¹⁰

If the state is a whole, composed of individuals and families as parts, and the whole is prior to the parts, then the state is prior to the individual and the family.

⁸ *In I Polit.*, c. 1, n. 21. See also *Politics* I.2.1253a 2.

⁹ Mary Keys, *Aquinas, Aristotle, and the Promise of the Common Good*, 77. Keys suggests that Aquinas may have focused on the second argument because he found the first unsatisfactory, or at least inconclusive.

¹⁰ *Politics* I.2.1253a 19-28.

Commenting on this passage, Thomas says, “The whole is necessarily prior to the parts, namely, in the rank of nature and perfection.”¹¹ The part is corrupted when the whole is corrupted, because “every part is defined by its activity and the power by which it acts.”¹² The severed foot no longer has the power to walk and the operation of walking, and immediately begins to corrupt. When something is corrupted, it loses its species and therefore its definition.¹³ Therefore, it cannot be called by the same name (since the name implies the definition), except equivocally. The severed foot is a foot only equivocally. So, Thomas concludes, “the whole is clearly by nature prior to its material parts, although the parts are prior in the order of coming to be. But individual human beings are related to the whole political community like the parts of a human being to the human being. For, as hands and feet cannot exist apart from a human being, so neither is a human being self-sufficient for living apart from a political community.”¹⁴

In the first book of the *Politics*, there is some ambiguity about whether the state is composed of households, of all the persons who live within the state, or of citizens alone. In Book III, Aristotle returns to the definition of the state, commenting on this point: “But a state is a composite, like any other whole made up of many parts;--these are the citizens, who compose it.”¹⁵ Now, there are other persons who in some sense compose the state, but who are not citizens (for Aristotle these would be slaves, women, children, and resident aliens). Since the government joins the parts of the state together, and

¹¹ *In I Polit.*, c. 1, n. 22.

¹² *In I Polit.*, c. 1, n. 22.

¹³ This is true of material wholes, but not of species as wholes. The parts of a species (i.e., the elements of the definition) are not corrupted when the whole is corrupted (e.g., the line is not corrupted by the corruption of the triangle).

¹⁴ *In I Polit.*, c. 1, n. 22.

¹⁵ *Politics* III.1.1274b 39-40.

citizens are those who can participate in governing,¹⁶ citizens are the principal parts of the state. Non-citizens are parts of the state in a secondary sense.¹⁷ Thus, “a state is a body of citizens sufficing for the purposes of life.”¹⁸

Aristotle uses two comparisons to convey the priority of the state as a whole: a checkers game and a living body. The first of these comparisons is used only once, when he likens a man without a state to an isolated checkers piece.¹⁹ A checkers piece by itself is not really a checkers piece at all; the piece “gains its very identity, and thus in a sense its existence, by its relation to the game of which it is a part.”²⁰ Just as an isolated checkers piece is an equivocal checkers piece, an isolated man is an equivocal man (such a man would be either like a beast or a god, Aristotle adds). Aristotle gives more attention, however, to the second comparison:

Again, the state, as composed of unlikes, may be compared to the living being: as the first elements into which a living being is resolved are soul and body, as soul is made up of rational principle and appetite, the family of husband and wife, property of master and slave, so of all these, as well as other dissimilar elements, the state is composed.²¹

Through both the checkers game and the bodily comparisons, Aristotle affirms the idea that the individual man is to the state as the part is to the whole. Perhaps he focuses more on the comparison with the living body because it more accurately represents the naturalness of the state, which he has already affirmed.

¹⁶ *Politics* III.1.1275b 18-21.

¹⁷ See *Politics* III.4.1277a 5-13 (quoted below).

¹⁸ *Politics* III.1.1275b 20.

¹⁹ *Politics* I.2.

²⁰ Jonathan Lear, *Aristotle: The Desire to Understand*, 200.

²¹ *Politics* III.4.1277a5-13.

Man's identity as part of a whole recurs in many different contexts in the *Summa Theologiae*.²² Thomas adopts the language of the living body, rather than the checkers game as a metaphor for the state. However, he does not use the comparison in quite the same way as Aristotle does. In the passage just quoted, Aristotle uses it to explain the differentiation of social roles (husband, wife, master, slave). Thomas, on the other hand, uses it mainly to explain the relationship between the individual and the society:

Just as a physician looks to health as the end in his work, and health consists in the orderly concord of humors, so, too, the ruler of a state intends peace in his work, and peace consists in "the ordered concord of citizens." Now, the physician quite properly and beneficially cuts off a diseased organ if the corruption of the body is threatened because of it. Therefore, the ruler of a state executes pestiferous men justly and sinlessly in order that the peace of the state may not be disrupted.²³

Though Thomas conceives the individual as a part of the state, he says elsewhere, "man is not ordained to the body politic, according to all that he is and has."²⁴ Here Thomas departs from Aristotle because he has man's supernatural end in view. Although every man is ordered to the state, he is not *in every respect* ordered to the state. The individual man is a part of the state, but he also transcends the state. He is ordained to a supernatural end, eternal beatitude, which does not negate, but surpasses, his natural end. The living body comparison raises some important questions for Thomas's account, which will be addressed in the next section.

We have seen thus far that every community seeks some good; the highest community seeks the highest good. The political community is the highest community,

²² *S.T.* I-II, q. 21, a. 3; II-II q. 58, a. 7; II-II, q. 61, a. 1; II-II, q. 65, a. 1; I-II, q. 92, a. 1, ad 3.

²³ *S.C.G.* III, c. 146, n. 5. "Pestiferous" translates *pestifer*, which judging from the medical analogy seems to mean that which presents a threat to the life of the community.

²⁴ *S.T.* I-II, q. 21, a. 4, ad 3.

because of all human communities, it is the most complete and self-sufficient. The state is natural: first because it is the end of a natural activity (men associating with each other), and the end of a natural activity is natural; and second because man's capacity for language is ordered to communication about the just and the unjust, and communication about the just and unjust is the source of political communities. The state is prior to other human communities because it is more perfect and complete. The state is a whole, which is like a living body in that it is composed of different elements; citizens are the primary parts of the state. For Thomas, though man is part of the state, he also has an end that surpasses the state, and therefore is not a part of the state according to all that he is and has.

B The Political Community as a Whole²⁵

The priority of the common good over the private good depends on the more fundamental priority of whole over part.²⁶ "Whole" is an equivocal term; it signifies different realities. "Animal" means the same thing whether it is said of a man or an ox, but this is not the case with "whole," which does not mean the same thing when it is said of a lake, a house, a man, an argument, or an action.²⁷ Yet this is not a case of pure equivocation, because there is a rational relation between different uses of "whole." All wholes signify a kind of unity; it is only by virtue of being in some way one that we call anything a whole.

²⁵ I am indebted to Chapter V of the doctoral dissertation of Fr. Sebastian Walshe, *The Primacy of the Common Good as the Root of Personal Dignity in the Doctrine of Saint Thomas Aquinas*, for pointing out many of the references in this section.

²⁶ "The whole is of necessity prior to the part." *Politics* I.2.1253a 20.

²⁷ See *Categories*, translated by E. M. Edghill, in *The Basic Works of Aristotle*, I.1.1a.

Yet not everything that is one is properly called a whole. Like the term “whole,” the term “one” has many senses.²⁸ A thing may be one accidentally, as ‘musical man’ is one. To be musical is an accident of man, and therefore ‘man’ and ‘musical’ are united accidentally. Things that are one in this way are not said to be wholes. A thing may also be one in virtue of its nature. The things that are one by their nature are more truly one than those things that are accidentally one.²⁹ But not all things that are one by nature are wholes either. There are three different senses in which something is one by virtue of its nature. First, something may be one as continuous; as a line or of a part of the body is one. Second, something may be one as indivisible, as a point (the limit of a line) is one. Third, something may be one as having the same formula of essence, as “raiment” and “dress”; these are one because they have the same definition.³⁰

Only when something is one in the third sense—one in form or definition—is it properly one. What is properly one is called whole: “While in a sense we call anything one if it is a quantity and continuous, in a sense we do not unless it is a whole, i.e. unless it has unity of form.”³¹ For example, we would not say that Mount Everest, a whale, and the *Summa* make up a whole. Even though the three could be one in some sense, e.g. by having the term “large” predicated of them, this is only an accidental unity and not a unity of form.

²⁸ *Physics* I.2:185b 7.

²⁹ *Metaph.* V.6: 1016b.

³⁰ *Ibid*; *Physics* I.2:185b.

³¹ *Metaph.* V.6: 1016b. See *ST I* q. 76, 1.

The form is the principle of unity in a whole, but as wholes are united by different forms, they are one in different senses. There are two main senses in which something is said to be a whole:

For the universal whole is in each part according to its entire essence and power; as animal in a man and in a horse; and therefore it is properly predicated of each part. But the integral whole is not in each part, neither according to its whole essence, nor according to its whole power. Therefore in no way can it be predicated of each part.³²

One kind of whole can be predicated of its parts, and this is a universal whole. A species is a universal whole, and this kind of whole is predicated of its member or part (e.g., man is an animal). The other kind of whole, an integral whole, is not predicated of its parts. For example, a house is a whole of which its wall is a part, and we do not say that a wall is a house. We might predicate the integral whole of all the parts together, “as if we were to say that the wall, roof, and foundations are a house,” but this is not strictly true. To have a house, it is not enough to have wall, roof, and foundations; these must be arranged in a certain order, so that the foundations support the walls, and the walls support the roof.³³

The wholes which we most associate with the name are integral wholes, which include human communities. Among integral wholes, another distinction is relevant: an integral whole, which again is a whole that is not predicated of its parts, may be one *per se* or one because of a certain order. Something is one *per se*, or essentially one, if it is

³² *S.T. I*, q. 77, a. 1, ad 1. See also *In V Metaph.*, lect. 21, n. 1099; *De Spir. Creat.*, a. 11, ad 2.

³³ *S.T. I*, q. 77, a. 1, ad 1. Aquinas mentions a third category, a potential whole, which is “midway between the universal whole, and the integral whole.” This whole may be predicated of its parts, but not properly, and not according to its whole power. In this way the soul is predicated of its parts (memory, understanding, will). This category is not mentioned in the *Commentary on the Metaphysics* or elsewhere, since it is not in Aristotle’s text.

one matter (a lake) or if it is one substance (a man).³⁴ In this kind of whole, the parts have no proper activity apart from the activity of the whole.³⁵ If a boat sails in part of the lake, it also sails in the lake as a whole. If a man's hand kills, the whole man kills.³⁶ Any proper activity of the part is also the activity of the whole.³⁷

On the other hand, an integral whole may be a whole because of some order, either a real order, or an order of reason. In wholes that are one only because of some order, the parts may have a proper activity that is not also the activity of the whole. For example, a flock of sheep is a whole by virtue of a real order. A single sheep has an activity apart from the flock; if one sheep is sleeping, it is not necessarily the case that the flock is asleep. This kind of whole is an accidental whole, which must be distinguished from something accidentally one: an accidental whole is essentially one, because it is united by a form, but it is an accidental whole, because it is united by an accidental form. Having examined the different senses of "whole," we can now consider the part in its relation to the whole, a relation that depends on the kind of whole.

For Aristotle and Aquinas, the principle that every whole is greater than its part serves as the foundation for arguments about the priority of the common good.³⁸ This is not a principle susceptible to strict proof, Aquinas notes, "certain axioms or propositions

³⁴ *In V Metaph.*, lect. 11, n. 911.

³⁵ Walshe, 207.

³⁶ "Homicide is not said to be the fault of the hand but of the whole man ... For the commission of one sin different parts of man are employed, namely the will, the reason, the hand and the eye and so on, and nevertheless there is only one sin because of the unity of the principle, namely the will, from which the nature of sin is transmitted to all the acts of the parts." *De Malo*, q. 4, a. 1.

³⁷ By "proper activity" is excluded purely involuntary activity; for example, one might use the foot of a sleeping man as a prop to hold up a book, but the activity of book-holding is not a proper activity of the foot.

³⁸ I exclude discussion of potential parts of things that are one as being continuous, such as a line, a bundle of sticks, or a part of the human body, since these are not properly wholes, in this view. *Metaph.* V.6.1016a.

are universally self-evident to all; and such are those propositions whose terms are known to all, as, ‘Every whole is greater than its part,’ and, ‘Things equal to one and the same are equal to one another.’”³⁹ We know this principle through sense experience of material parts and wholes, but we apply the principle more broadly to immaterial parts and wholes. The child offered the choice between part of a cookie and a whole cookie will immediately recognize the whole as the superior choice; he perceives that the whole is greater than the part. With reflection, this principle can be applied to nonmaterial realities: the speaker wants to have the whole attention of the listener, and not just a part of it; the listener wants to hear the whole story, and not just an episode (moreover, he wants to hear those parts in their right order, since a story is an integral whole made one by a rational order); the lover desires the whole heart of the beloved, and not a partial affection.

Yet in what sense is a whole “greater” than its parts? Why do we prefer the first item in each of the examples above? The whole, according to Aristotle, is to the part as complete to incomplete, as perfect to imperfect.⁴⁰ Aristotle and Aquinas also state the relationship between whole and part in terms of priority: “The whole is prior to its part.” This either seems to be the same as or closely related to the statement “the whole is greater than its part.”⁴¹ Both “greater” and “prior” are relative terms. Both express some

³⁹ *S.T.* I-II, q. 94, a. 2. See also *S.C.G.* III, c. 112, n. 5: “Further, it is evident that all parts are ordered to the perfection of the whole, since a whole does not exist for the sake of its parts, but, rather, the parts are for the whole.”

⁴⁰ *Physics* III.6.207a14 : “The whole and the complete are either entirely the same or quite close in their nature.” See also *In V Metaph.*, lect. 18, n. 1033 “For the terms perfect and whole have the same or nearly the same meaning.”

⁴¹ While Aristotle and Aquinas clearly define the senses of “prior,” they do not do so for the senses of “greater.”

sort of precedence. “Greater” is used of both material and immaterial wholes, while “prior” applies more to the consideration of nonmaterial wholes: one event is prior to another; the cause is prior to the effect, etc. Since “prior” has a narrower sense, and because priority is the concept that both Aristotle and Aquinas use in describing the status of the common good (Aquinas also uses “greater” in this context), I hereafter focus on the formulation “the whole is prior to its part.”

According to Aristotle, the whole is prior to its part as a complete reality. Like the term *whole*, the term *prior* also has several different senses.⁴² Aristotle analyzes the priority of whole over part in terms of potentiality and actuality:

According as potency or complete reality is taken into account, different things are prior, for some things are prior in respect of potency, others in respect of complete reality, e.g. in potency the half line is prior to the whole line, and the part to the whole ... but in complete reality these are posterior; for it is only when the whole has been dissolved that they will exist in complete reality.⁴³

The part is posterior to the whole in actuality because it receives its actuality from the whole: if there were no line, there could be no half-line. But in potency, the part is prior to the whole. Take two lines of equal length, Y and Z. These may be considered as two actual lines, but they may also be considered as potential half-lines of line X (where $X = Y + Z$). One might say that the potential line X only exists by virtue of the potency in lines Y and Z to be half lines. Thus, the potential whole receives its actuality from the potential halves.

⁴² In the *Categories*, five are named: prior in time, prior in being, prior with reference to an order, prior as being more honorable, and prior as cause is prior to effect. (12.14a26-14b 22) A more comprehensive treatment is found in the *Metaphysics*, where the categories are: prior in respect to some principle; prior in knowledge, as the attributes of prior things are prior; prior in nature or substance; and prior with respect to potentiality and actuality. It is under the last category that the relationship of whole and part is considered. V.11.1019a1-10. See John J. Cleary, *Aristotle on the Many Senses of Priority*, Chapters 2, 3.

⁴³ *Metaph.* V.11.1019a6-10..

When the part is separated from the whole, it has an actual existence apart from the whole, but in a different sense. It is no longer part of the whole, but something else. When the half-line is separated from the line with length X , it is no longer a half-line, but a line of length $X/2$. With reference to the parts of a living whole, one commentator explains: “It is possible for Aristotle to claim that the material parts of a living whole cannot ‘be’ (in the sense of having substantial form) without the whole and, hence, that they are posterior in this sense of actuality. But when the whole is dissolved, they are actualized as material parts (a different sense of being).”⁴⁴ So the hand has no substantial form without the animal body of which it is a member. If the hand is severed, it acquires an actual existence apart from the animal, but no longer as an animal’s hand, but as a lump of decaying flesh.

Commenting on the same passage in the *Metaphysics*, Aquinas says that “from the viewpoint of actuality [the parts] are said to be subsequent, since they become actual only by the dissolution of some whole. For when a whole is dissolved into its parts, the parts then begin to exist actually.”⁴⁵ The part does not exist as a complete reality until actually separated from the whole; thus, the existence of the part presupposes the existence of the whole.

In the *Summa Theologiae*, Aquinas also considers the priority of whole over part in terms of causality. There is a sense in which the part is the cause of the whole, since the whole depends on the parts as on a material cause, for if any part is missing, it is

⁴⁴ Cleary, 50.

⁴⁵ *In V Metaph.*, lect. 13, n. 952.

incomplete (and therefore not whole).⁴⁶ However, the whole is the formal cause of its parts. The parts are as matter to the form, which is the whole, and as “matter is for the sake of the form, and not the form for the matter,”⁴⁷ the parts are for the sake of the whole. There is also a sense in which the whole is the final cause of its parts. The whole is “that for the sake of which” the part is what it is. The whole is the common end of all the parts⁴⁸ and the end of each part as part. So the part is for the good of the whole, and must be suited to the whole, rather than the whole to the part; in other words, the good of the part is ordered to the good of the whole:

But the good and the better are not considered in the same way, in the whole and in the parts. For, in the whole, the good is integrity, which is the result of the order and composition of its parts. Consequently, it is better for there to be an inequality among the parts of the whole, without which the order and perfection of the whole cannot be, than for all its parts to be equal, even if each of them were to exist on the level of the most important part. However, if the parts are considered in themselves, each part of a lower grade would be better if it were on the level of the higher part. This is exemplified in the human body: in fact, the foot would be a more worthy part if it possessed the beauty and power of the eye, but the whole body would be more imperfect if it lacked the functioning of the foot.⁴⁹

What would be good for the part considered in itself, may not be best for the whole, and since the part is for the sake of the whole, it would be unreasonable to prefer the good of the part at the expense of the good of the whole. For example, it would be unreasonable for a starving person to refuse to eat food that he dislikes, sacrificing the good of his entire self for the good of his palate. The good of the whole, which is the final cause in

⁴⁶ *S.T.* III, q. 90, a. 1: “The parts of a thing are those into which the whole is divided materially, for the parts of a thing are to the whole, what matter is to the form; wherefore the parts are reckoned as a kind of material cause, and the whole as a kind of formal cause (*Physics* II).”

⁴⁷ *S.T.* I, q. 47, a. 1.

⁴⁸ *S.T.* I-II, q. 90, a. 2, ad 2: “Particular matters are referable to the common good ... as to a common final cause, according as the common good is said to be the common end.”

⁴⁹ *S.C.G.* III, c. 94, n. 11.

relation to the part, “is integrity, which is the result of the order and composition of its parts.” This order and composition in the whole is also the formal cause of the parts. And the whole, by virtue of its integrity, is prior as a complete reality to its parts, which in themselves are imperfect and incomplete.

The order of part to whole is most evident when we consider a *per se* whole, such as a human being. But the priority of whole over part does not apply only to *per se* wholes. A whole, as whole, has priority as a complete reality over its part. So, a house, which is an accidental whole, is prior to its walls, floors, and roof. The house is the formal cause of the walls, since the form of the house existed in the mind of the builder before the walls were built. The house is also prior to its parts as final cause, since the house is the reason for walls, floors, and roof.

If the political community is a whole, and its members are parts of that whole, then the political community is prior to its members. That a political society is in some way *one* is evident from the fact that it is called “the state” or “the city.” If the disparate elements included in the name were not in some way united, we could make no sense of the name. More specifically, according to both Aristotle and Aquinas, the state is a whole. Thomas comments in the *Treatise on Justice*, “It is evident that all who are included in a community stand in relation to that community as parts to a whole.”⁵⁰ Yet as we have seen, the term “whole” has many senses. It is Aquinas who specifies the kind of whole meant by the political society, when he says that the state has a unity of order. He makes this distinction in the introduction to his Commentary on Aristotle’s *Ethics*.

⁵⁰ *S.T.* II-II, q. 58, a. 5.

Aristotle begins his *Ethics* by considering the nature of moral philosophy, and Aquinas begins his commentary in the same way, making some general remarks in the *Proemium* on the different kinds of order found in things and considered by the different sciences and arts. Each art and science is distinguished by a different end.⁵¹ Moral philosophy considers the order in human operations. Since human operations may be operations of the individual, the family, or the civil society, moral philosophy is divided into three parts: individual (*monastica*), domestic (*oeconomica*), and political (*politica*).⁵² The end of moral philosophy is an operation, rather than a product; and as the operations differ, so do the ends of each branch of moral philosophy. It is in this context that the relation between whole and part arises. If one science considers a certain whole, does the same science also consider the parts of that whole? It depends on the kind of whole, Thomas answers. For a whole that is one *per se*, in which “there is no operation of the part that does not belong to the whole,” the part and the whole are treated by the same science.⁵³ Thus it belongs to botany not only to treat the whole plant, but leaves, roots, stem, etc.

On the other hand, in a whole that has only the unity of order, the parts “can have an operation that is not the operation of the whole,” and in this case, the same science or art does not consider the parts and the whole.⁵⁴ Thomas offers the example of the army. Since an army has only the unity of an order, its parts have operations that are not

⁵¹ *Ethics* I.1.1094a5-6.

⁵² *In I Ethic.*, lect. 1, n. 6.

⁵³ *In I Ethic.*, lect. 1, n. 5.

⁵⁴ *Ibid.*

operations of the whole.⁵⁵ The soldier as soldier is a part of the army, but the soldier does many things that he does not do as a member of the army: he marries a woman, he raises children, he reads Aristotle's *Ethics*, etc. None of these is an act of the army. They are acts of the soldier, not as soldier, but as man, father, student, etc. On the other hand, the whole army has an operation that can be ascribed to the whole, but not to each of the parts individually. We say of the whole army (or of the commander, its principal part) that it advances on the enemy, but this is not properly said of each individual soldier.

It must be known moreover that the whole which the political group or the family constitutes has only the unity of an order (*ordinis unitas*), for it is not something absolutely one (*simpliciter unum*). A part of this whole, therefore, can have an operation that is not the operation of the whole, as a soldier in an army has an activity that does not belong to the whole army. However, the whole does have an operation that is not proper to its parts but to the whole—for example, the assault of the entire army.⁵⁶

The political community, then, is not one in the sense that substance is one, but like an army, it has a unity of order. Therefore it is a whole, not a substantial whole, but an accidental whole. And just as the substantial form is the nature of a substantial whole, the accidental form which unifies the accidental whole is the nature of that whole. “We say that the nature of each thing is what belongs to it when its coming-to-be is complete,” whether the thing is a horse or a house.⁵⁷

And since human reason can dispose both the things that human beings use and human beings themselves, who are governed by reason, it proceeds in both cases from simple things to composite things. Regarding things that human beings use, for example, human beings build ships out of timber, and houses out of stones and wood. And regarding human beings themselves, for example, human reason directs a number of human beings to form a particular association. And since

⁵⁵ *In I Ethic.*, lect. 1, n. 5.

⁵⁶ *In I Ethic.* lect. 1, n. 5.

⁵⁷ *In I Polit.*, c. 1, n. 18.

there are indeed different grades and orders of these associations, the ultimate association is the political community directed to things self-sufficient for human life.⁵⁸

Yet if the political community has only the unity of an order, and not substantial unity, perhaps it is somewhat deceptive to compare it to a living body, as Thomas does, when he says for example:

Since a member is part of the whole human body, it is for the sake of the whole, as the imperfect for the perfect. Hence a member of the human body is to be disposed of according as it is expedient for the body.... [And] the whole of man is directed as to his end to the whole of the community of which he is a part.⁵⁹

We must be clear that Thomas does not maintain that the state is an organic entity, or a substance of any kind. First, if the state were a substance, its parts could not be substances, for that which subsists cannot exist in another.⁶⁰ But individual persons are substances, and therefore the political community (or any association of persons) is not a substance. Second, if the state were a substance, it would mean that no part of the state could have an action that was not an action of the whole state, which is clearly not the case. Philosopher Mary Keys comments, the parts of the state “are not organically united in a ‘body politic,’ as demonstrated by the simple fact that each citizen can perform actions that are proper to him or her, and that are not similarly attributable to the whole political community of which he or she forms part.”⁶¹ Thomas also says that many actions performed by citizens are not attributable to the community as a whole (are not

⁵⁸ *In Polit.*, Prologue.

⁵⁹ *S.T.* II-II, q. 65, a. 1.

⁶⁰ Aristotle *Categories* 5.11-12.

⁶¹ Keys, *Aquinas, Aristotle, and the Promise of the Common Good*, 85 (footnote omitted).

actions of citizens as citizens).⁶² Therefore, the political society is not a substantial whole or an organic entity, but a whole unified by a certain order.

If the political community is an accidental unity, while individual persons are substances, it seems Thomas must hold individuals to be superior to the community of which they are parts, since substance is superior to accident. Yet while “substance is more excellent simply than accident: and yet relatively some particular accident is more excellent than substance in so far as it perfects substance in some accidental mode of being.”⁶³ The human being is more excellent simply than the political community, which is an accidental unity, but relative to the human social capacity, the political community is more excellent. In other words, the political community is more excellent insofar as it perfects human beings in their social capacity. The excellence of the community is based on its ability to perfect the individual man, which it does as the object of his love. The individual is perfected in loving the community’s good above his private good.

Aristotle also recognizes the limits on the unity of political society, though not as clearly as Thomas. Aristotle criticizes Socrates for wanting to create too much unity in the state by having everything in common. He has many practical reservations about this policy, but more fundamentally, he says that it rests on a mistaken idea about unity.⁶⁴ A state does not aim at unity without limits, but at unity out of a plurality, with elements different in kind. Both the family and the individual are more one than the state, and it would be unwise to try to impose these kinds of unity on the state, even if it were

⁶² *In I Ethic.*, lect. 1, n. 5.

⁶³ *S.T.* I-II, q. 66, a. 4.

⁶⁴ *Politics* II.5.1263b32: “The error of Socrates must be attributed to the false notion of unity from which he starts.” Socrates says in the *Republic* that property, women, and children should be held in common.

possible. If the state were one in all respects, it would cease to be a state.⁶⁵ Diversity is good for the state because it contributes to self-sufficiency.⁶⁶

To return to our question: if Thomas did not treat the state as a *per se* whole, why did he so often compare it to a living organism? If it appeared only in his commentaries on Aristotle, one could argue that he did not fully endorse it, but in fact, this comparison also occurs in the *Summa Theologiae* and the *Summa Contra Gentiles*. He clearly thought it a helpful comparison, and he does not seem to share the modern fear of an all-encompassing totalitarian state.⁶⁷ Positively, Thomas uses the comparison as a vivid illustration of the integrity of the whole, and the orientation of each part to the good of the whole. Since the political community is a whole made up of human persons, a comparison based on artifacts (such as the checkers game) is at least as defective. At the same time, there are obvious differences between a political community and a living organism, as noted above.

In the end, however, the living body comparison does not carry the weight of proof in Thomas's discussions of the political community. His examples from medicine do not prove that the common good is prior to the individual good. Both the priority of the living body and the priority of the state rely on the principle that the whole is greater than the part, which Thomas understands to be an indemonstrable principle. One understands it simply by reflecting on what it means to be whole and part. However, this

⁶⁵ *Politics* II.2.1261a17-22.

⁶⁶ *Politics* II.2.1261b15.

⁶⁷ One wonders whether a totalitarian state would even have been conceivable in the 13th century. The political communities of the time were loosely organized groups, often with multiple allegiances (a feudal lord, the imperial throne, the pope). Perhaps totalitarianism requires industrialization and the modern state. See Coleman, *A History of Political Thought*, 17-32.

reflection draws on experience. The idea that the whole is greater than the part is known first from experience of material wholes, such as living bodies. Upon further reflection, it is applied to immaterial wholes, and the priority of the whole is understood in reflecting on these immaterial wholes as they are actually experienced.

The comparison with the living body is important, but it is not necessary to Thomas's doctrine of the common good. His comparison to an army might be less controversial, though it too is imperfect. The advantage of the army analogy is that both army and state are wholes composed of persons, wholes with the unity of an order. The advantage of the bodily analogy is that it emphasizes the naturalness of political society, which Aquinas, like Aristotle, wanted to affirm. Political society is natural in that it is the effect and end of a natural social tendency in man. For Aquinas, political authority and society are natural, not only to fallen man, but to human nature in any condition, something that is not true of military organizations. In the end, both the bodily analogy and the army analogy are only likenesses. The political whole must also be considered on its own, according to what unifies it specifically, and that which unifies it is not the same as that which unifies either an army or a human being. As Yves Simon comments,

Likening society to an organism may be useful as long as we remain in control of our analogies and understand that society is not one after the fashion of an organic body. Its individual members are not organs or cells but primary subjects of human existence.⁶⁸

I began this chapter on St. Thomas's view of the common good by considering his understanding of wholes and parts, and the political society as a whole. A whole is something that has unity of form. A whole may be one *per se* or one according to a

⁶⁸ Simon, "Common Good and Common Action," 237.

certain order. Every whole, as whole, is prior to its part as a complete reality, and is related to its parts as formal cause. The political community is an integral whole, but not a *per se* whole. The political community is an accidental whole, unified by a certain order. As a whole, the political community is prior to its parts. But it is not prior in an absolute sense. Here we must recall Aquinas's saying that "things not of the same genus are in no way comparable to each other if indeed they are in different genera."⁶⁹ But the state, an accidental unity, and the human being, a substantial unity, are not in the same genus and therefore not, as such, commensurable. In order to compare the community and the individual, one must compare them in a common genus: the genus of final cause. The end is the final cause in practical matters, we can compare the ends of two different practical pursuits on the level of causality. One cause is prior to another if it extends to more effects. The good of the community extends to more effects because many agents have it as their good, whereas the private or particular good is the good of one agent only.

C The Common Good

Thomas maintains that the community is prior to the individual, on the level of ends or goods. His justification of CP depends on this priority. But what is the good of the community, and how is it prior to the individual's good? Thomas did not write a treatise on the common good; we cannot find even a single question devoted exclusively to this topic. Nonetheless, the phrase *bonum commune* occurs frequently in his works, as does the idea of "the preeminence of the common good." The twentieth century Thomist

⁶⁹ *S.T.* I, q. 6, a. 2, ad 3.

I. Th. Eschmann compiled a glossary of 204 citations of “the principle of the preeminence of the common good” in the Thomistic corpus.⁷⁰

The principle that the common good is to be preferred to the private good (*bonum commune praeferatur bono privato*), or the principle of the priority or preeminence of the common good, is not original to Aquinas. Eschmann in fact says that “in every case the statement of our principle in St. Thomas is in the form of a quotation whether or not the author presents it expressly as such”; and with two exceptions, the authority quoted is Aristotle.⁷¹ However, Eschmann argues, what Thomas presents is not primarily an Aristotelian doctrine, but a scholastic axiom, derived from Roman and patristic sources; “generally speaking the Aristotelian authority is an addition to a pre-established doctrine whose main lines and significations had been fixed quite apart from Aristotelian philosophy.”⁷²

While Eschmann is right to point out the scholastic precedents for the principle of the preeminence of the common good, it is difficult to put aside the continual references to Aristotle in this context as playing a merely “decorative” role.⁷³ As important as it is to understand the historical context in which an author wrote, it is at least equally important to take an author at his word, unless there is serious reason for doing otherwise. If Thomas claims to explain his teaching using Aristotelian principles, we ought to accept that this is indeed what he is doing, whether successfully or not. His debt to patristic and

⁷⁰ I. Th. Eschmann, “Thomistic Glossary on the Principle of the Preeminence of a Common Good.”

⁷¹ “Thomistic Glossary,” 124.

⁷² “Thomistic Glossary,” 124.

⁷³ “This latter [Aristotelian philosophy] reinforces the Roman-patristic ideas and plays a decorative rather than a constructive rôle.” Eschmann, “Thomistic Glossary,” 124.

Roman authors need not contradict this; Thomas may have received this principle through the scholastic tradition, but he found its philosophical justification in Aristotle.

It must be noted that Eschmann was part of a somewhat contentious debate in the middle of the twentieth century about the nature of the common good in Saint Thomas. Another twentieth-century Thomist, Charles de De Koninck, had written a treatise *On the Primacy of the Common Good Against the Personalists*, in which he made a carefully documented case for the Thomistic doctrine of the primacy of the common good over the good of the individual. In presenting this doctrine as a refutation of “the personalists,” he provoked the ire of those sympathetic to the thought of Jacques Maritain. Maritain seemed to be the target of De Koninck’s critique, though his name was nowhere mentioned. Eschmann responded to De Koninck with an antagonistic piece entitled “In Defense of Maritain.” Eschmann’s defense of Maritain was flawed, and not fully representative of Maritain. De Koninck’s response to Eschmann was thorough and well-documented, but did nothing to ameliorate the angry tone of the exchange.⁷⁴

A more measured response to De Koninck came from another renowned Thomist, Yves Simon, who reviewed *On the Primacy of the Common Good* for the *Review of Politics*. Simon writes that De Koninck does an admirable job in summing up the Thomistic doctrine of the common good, but he does not develop it in any great depth. Moreover, his critique of the personalists attacks a straw man, and fails to make a helpful contribution. He concludes:

⁷⁴ De Koninck, “In Defense of Saint Thomas: A Reply to Fr. Eschmann’s Attack on the Primacy of the Common Good.”

Insofar as De Koninck's essay vindicates the primacy of the common good and carries out the criticism of definite positions, it is entirely praiseworthy. Insofar as it seems to be aimed at books that the writer never read, at doctrines that he does not expound, and men whose names he does not mention, the essay against the personalists, is a purely private affair, which concerns exclusively De Koninck, and is of no concern whatsoever to the reader.⁷⁵

The reaction to De Koninck's work tells us that Thomas's teaching on the common good faces many obstacles to acceptance. The compatibility of this doctrine with any sort of personalism is a question I will not attempt to answer.⁷⁶ Rather, I will focus on Thomas's teaching as it lays the groundwork for his teaching on capital punishment. In Chapter IV, I will address some objections to this view of the common good.

C.1. Proper Good

Thomas does not simply define common good for us, but instead he distinguishes common goods from proper goods.⁷⁷ Proper good has several senses:

Now, the good that is proper (*bonum suum*) to a thing may be received in many ways. One way depends on what is appropriate (*proprium*) to the essential character of the individual. It is thus that an animal seeks his good (*bonum suum*), when he desires the food whereby he may be kept in existence. A second way depends on what is appropriate to the species. It is in this way that an animal desires his proper good (*proprium bonum*), inasmuch as he desires the procreation of offspring and the nourishment of the same, or the performance of any other work that is for the preservation or protection of individuals belonging to his species. A third way depends on the essential character of his genus. It is in this way that an equivocal agent seeks its proper good (*proprium bonum*) by an act of causation, as in the case of the heavens. And a fourth way depends on the analogical likeness of things produced, in relation to their source. And it is in this

⁷⁵ Yves Simon, "On the Common Good," 533.

⁷⁶ For a good treatment of this problem, see Mary Keys, "Personal Dignity and the Common Good: A Twentieth Century Thomistic Dialogue."

⁷⁷ The term "proper good" can translate two different phrases used by Aquinas: *bonum proprium* and *bonum suum* (or occasionally *bonum suum singulare*). Thomas uses both *bonum proprium* and *bonum suum* in multiple senses, as seen in the passage cited below.

way that God, Who is beyond genus, gives existing being to all, because of His own goodness (*propter suum bonum*).⁷⁸

Our concern is with the first two senses mentioned by Thomas. Proper good in the first sense cannot be a common good, for it is the good belonging to the individual as individual. For example, the good of health is proper to the individual in this sense. In the second sense, however, the proper good is a common good, since the preservation of the species is both a good for this individual and for other individuals. It is proper in being the good of this individual, and common in being the good of several individuals. Most broadly, a proper good is any good that a thing naturally seeks, which includes, but is not limited to, its particular good.

De Koninck points out that the proper good is opposed not to common good, but to the good of another individual, or the “alien good,” a thesis that was argued by the seventeenth-century Thomistic commentator John of St. Thomas. The common good is opposed to a foreign or alien good (*bonum alienum*). A foreign good is one that is proper to another individual as an individual.⁷⁹ Thus the health of Jones is a foreign good from the perspective of Smith.

But how is that the individual his proper good when he acts so as to preserve the species or protect other members of the species? The key to understanding this is the concept of natural desire or natural inclination. This way of speaking about nature is foreign to the modern ear, although less so if we substitute “instinct” for natural desire. For Aquinas and Aristotle, nature is purposeful: even things having no knowledge, in

⁷⁸ *S.C.G.* III, c. 24, n. 7.

⁷⁹ Charles de Koninck, “On the Primacy of the Common Good Against the Personalists,” 18. See John of St. Thomas, *Cursus philosophicus Thomisticus* III, q. 3, a. 1, cited in De Koninck, “Primacy of the Common Good,” 18, note 9.

acting in regular, predictable ways, move toward (desire) an end. That is, there is a reason for their acting in certain ways (even if the thing itself cannot give the reason).⁸⁰ While Darwinian science rejects the idea of purpose, it has reasonably been argued that evolution and natural teleology are not incompatible, so long as one does not tie evolution to certain philosophical notions, such as the notion that chance can act as a cause.⁸¹ I simply note this debate here; in what follows I will focus on how Aquinas and Aristotle understand the idea of natural desire.

How is it that an animal is said to “desire” (*appetere*) his proper good, either his particular proper good or some other proper good, and what is meant by calling certain desires or inclinations natural? The concept of natural desire is a description of the way natural things tend to behave. The basis for Aquinas’s idea of natural desire is the Aristotelian doctrine that nature acts for an end. The following is Aquinas’s restatement of Aristotle’s first argument in *Physics* II for this thesis:

Everything which happens either happens by chance or for the sake of an end. Now those things which happen outside the intention of an end are said to happen by chance. But it is impossible for those things which happen in every instance or in most instances to happen by chance. Therefore, those things which happen in every instance or in most instances happen for the sake of an end.

⁸⁰ “It is absurd to suppose that purpose is not present because we do not observe the agent deliberating. Art does not deliberate. If the ship-building art were in the wood, it would produce the same results by nature. If, therefore, purpose is present in art, it is present also in nature. The best illustration is a doctor doctoring himself: nature is like that. It is plain then that nature is a cause, a cause that operates for a purpose.” *Physics* II.8.199b26-33.

⁸¹ For more on this subject, see Peter Pagan-Aguier, “Darwin and Design: Exploring a Debate,” in *Truth Matters*, edited by John Trapani.

Now whatever happens according to nature happens either in every instance or in most instances, as even they [his opponents] admitted. Therefore, whatever happens by nature happens for the sake of something.⁸²

I pointed out above that for Aristotle and Thomas, desire is not limited to rational desire. Each natural thing desires, or is inclined toward, its own being and perfection.⁸³ A natural desire is not the result of choice, but is in the thing on account of its nature, whether that nature is rational or not. This is important for Aquinas's understanding of proper good (in all its senses). The proper good of a thing is that which it naturally desires, which it cannot help but desire: "For a natural thing has a natural inclination ... with respect to its proper good (*proprium bonum*), to acquire it if not possessed, and, if possessed, to rest therein."⁸⁴ For example, an animal cannot help but desire to live, and desire those things that are necessary for life, like food. It cannot help but desire the survival of its species, and those things that are necessary for this end, like procreation.

If the claim that each natural thing has an inclination to its own proper good is based on observation, could this claim be falsified by contrary observations? For example, if a sick animal refuses the food necessary to its survival, does this disprove the claim that animals are naturally inclined (desire) to preserve their own life? This would seem to imply that whether an animal is inclined to act so as to preserve or destroy its own life is a matter of chance. "But when an event takes place always or for the most part," says Aristotle, "it is not incidental or by chance. In natural products the sequence is

⁸² *Commentary on Aristotle's Physics*, translated by Richard Blackwell, Richard J. Spath, and W. Edmund Thirlkel (New Haven, CT: Yale University Press, 1963), *In II Physic.*, lect. 13, n. 256.

⁸³ *S.C.G.* I, c. 37, n. 2. Each nature receives its proper good or due end from the Creator: "Wherefore God, Who moves all things to their due ends, bestowed on each thing the form whereby it is inclined to the end appointed to it by Him ..." *S.T.* II-II, q. 23, a. 2.

⁸⁴ *S.T.* I, q. 19, a. 2.

invariable, if there is no impediment.”⁸⁵ Contrary instances do not disprove the theory of natural desire, if these occur infrequently and are attributable to some impediment, such as illness.

The application of the idea of natural desire to matters of physical survival is one thing; its application to the preservation of the common good is more controversial.

Thomas uses the idea of the animal’s desire for the good of the species as a link connecting the obvious natural desire for food with the more abstract and less obvious desire for the common good. According to Thomas, an animal desires not only his own individual survival, but the survival of its species, as a proper good. Like the animal’s particular good, the good of the species is a material good. But unlike the particular good, the good of the species is a common good. That the species continues to survive is not the good of one individual member, but a good common to all members of the species. An animal serves the good of the species when, for example, it feeds its young. This act of feeding does not benefit the parent as a particular individual, but since it is part of the species, in acting for the common good of the species, it acts for a good which is its own (proper) good.⁸⁶

There is no doubt that reproduction and care for offspring are necessary to the survival of animal species. Yet many would interpret such actions in a different way. For example, the inclination to reproduce might be explained as the satisfaction of a physical urge. The care for offspring is somewhat more difficult to explain on a purely material

⁸⁵ *Physics* II.8.199b23-24.

⁸⁶ Thomas also refers to different kinds of human goods in *S.C.G.* III, c. 80: “For in human affairs there is a common good which is, in fact, the good of a state or a people ... There is also a type of human good which does not lie in the community, but pertains to one person as such ... Still another human good is pertinent to each person individually (*singulariter*).”

basis, for it does not seem to satisfy any immediate urge, but it could nonetheless be attributed to animal “instinct,” without further meaning. But while these suggestions are true as far as they go, they are not explanations. They do not give any purpose for the urge or the instinct. Things that are purposeless are not for the sake of something, and yet reproduction and care of offspring certainly seem to be for the sake of the survival of the species. Proper goods are the ends, or purposes, which natural desires serve; they are the objects of natural inclinations.

More controversial even than the ideas of natural desires and proper goods is the claim that there is an order among proper goods. For just as the desire for proper goods is not a matter of choice, the order among proper goods is not a matter of choice, but comes from the nature of a thing. In other words, it is natural for something to prefer its proper good to the good of another. Not only does the individual have a natural love for the good of the species, Aquinas claims, but “each individual naturally loves the good of the species more than its own individual good (*bonum suum singulare*).”⁸⁷ This love is true of rational and non-rational species, must be qualified when applied to free agents, as I will show below. If Thomas had written a treatise on the common good, he might have supplied examples from nature to illustrate the thesis that the individual loves the good of the species more than its own good. However, since he has not left us such a treatise, we must look for our own illustrations. We might consider, for example, the behavior of

⁸⁷ *S.T.* I q. 60, a. 5, ad 1. This principle occurs in Thomas’s *Treatise on the Angels* (*S.T.* I, qq. 50-64). It is mentioned in response to those who deny that angels naturally love God more than themselves. Thomas responds that if it is true that an individual naturally loves the good of its species more than its own good (here referring not to angels, but to species that are individuated by matter), it is also true that an individual (whether angelic or other) naturally loves the universal good (God) more than its own good.

emperor penguins.⁸⁸ After the female penguin has laid its egg, the male will take charge of the egg, keeping it warm for months, while the female searches for food. After the egg has hatched, the male will use its sparse food reserves to nourish the chick. If the inclination to feed his young were not stronger than the inclination to feed himself, the male penguin would not behave in this way. It would be far more beneficial for him, more in keeping with his particular good, to go off in search of food for himself, and leave the chick to die, instead of risking starvation by remaining with the chick.

To say that the individual loves the good of the species above its own individual good is not to say that the individual loves the species more than itself, as if the species were something that existed on its own, apart from its members. Thomas, following Aristotle, rejects the Platonic idea of species existing as separate forms.⁸⁹ The intellect understands particulars through the intelligible species, but these species do not have existence outside of the intellect. So the species cannot be the object of love in a real sense. The species ‘man’ is the concept by which one understands an individual man, but the species man is not the object of love. That the individual loves *the good of the species*, on the other hand, does not imply that the species exists as a separate form. Rather, what Aquinas means by saying the individual loves the good of the species is that the individual is inclined to do things that will preserve the species. And what he means by saying that the individual loves the good of the species *more* than its own good is that

⁸⁸ The behavior of emperor penguins is documented in the film “March of the Penguins” (Warner Independent Pictures, 2005).

⁸⁹ See *S.T. I*, q. 84, a. 4.

the individual's natural inclination to preserve the species is a *stronger* inclination than his natural inclination to self-preservation.

But when it comes to rational animals, we are faced with individuals who can choose whether or not to follow their natural inclinations. If Aquinas is right, however, the fact that animals do tend to act for the good of the species is not a chance thing, but the result of an order in natural inclinations. Aquinas uses this idea of order to explain why individuals (at least in many cases) *do* prefer the good of the species over their particular good (a descriptive claim), and also why it is *good* for individuals to prefer the common good (a normative claim), because the good of the species is a greater good than the good of the particular. Man is no different in this sense from other animals; he naturally loves the good of the species above his own private good: "Now just as the preservation of the bodily nature of one individual is a true good, so, too, is the preservation of the nature of the human species a very great good."⁹⁰ It is because of the importance of this good that Thomas accounts abuses of human sexuality (which are for the good of the preservation of the human species) more grievous than the abuses of food and drink (which are for the good of individual preservation).⁹¹

We have seen that for Thomas proper good can mean the good that belongs to an individual as individual, but it can also mean any good that is an end for the individual. In the first sense, a proper good is distinguished from a common good. In the second sense, a proper good may also be common. The common good is not the individual's exclusive

⁹⁰ *S.T.* II-II, q. 153, a. 2. The use of "good" and "very great good" is no doubt intentional. Thomas elsewhere remarks that in the book of Genesis, "we find it said of each creature, 'God saw the light that it was good' (Genesis 1:4); and in like manner of each one of the rest. But of all together it is said, 'God saw all the things that He had made, and they were very good' (Genesis 1:31)." *S.T.* I q. 47, a. 2, ad 1.

⁹¹ See *S.T.* II-II, q. 148, a. 3; q. 153, aa. 2, 3.

good, but it is nonetheless desired by an individual as his good. In this sense, the proper good is not opposed to the common good, but to the individual good of another (foreign good). The notion that the good of the community is a good proper to members of the community is founded on the Aristotelian-Thomistic doctrine of natural inclinations. Natural things desire (tend towards) what is perfective of their natures. This also is true of man, but as rational, man need not follow his natural inclinations. One of these natural inclinations for man is to seek the good of the species and more particularly the good of the political community. Man, in fact, naturally *prefers* these goods to his own individual good, though he by no means always follows this inclination. Because natural inclinations are good in this view, one can say both that man does prefer the common good (i.e. by his nature) and that man ought to prefer the common good (in order to be perfected in that nature). In order to understand what it means to prefer the common good, we need a better understanding of what Thomas means by common good.

C.2. Common Good

Like proper good, common good does not have just one meaning in the Thomistic corpus. In his article, “The Equivocal Status of Bonum Commune,” Gregory Froelich considers three ways that Thomas uses the expression *bonum commune*. Froelich’s careful division of common goods adds clarity to the often confused debate about the common good in Thomistic thought.

The first sense of *bonum commune* mentioned by Froelich is the good common in predication. This kind of good is common in the way that genus and species are common.

The species “man” is predicated of many things, but there is no reality that corresponds to human nature, as common: “The unity or community of the human nature, however, is not a reality, but is only in the consideration of the mind.”⁹² In the same way, there is no reality corresponding to a good common by predication. For example, there is no separate health or knowledge or temperance; there is only health or knowledge or temperance in this particular man.

The second way in which a good can be common is by way of causality, when one end is the cause of many:

But there is a way a good can be common and in the same respect belong to the individual.... Something can be called common either on the basis of predication or on the basis of causality. This second way belongs to a cause which while remaining numerically one extends to many effects. The sun, for example, is the common source of light and warmth for numerous things. Unlike something common by predication, it is common precisely as it is individual.⁹³

The good common in causation is not in opposition to the particular good because “it is both a common and a particular good.”⁹⁴ It is common because it is the good of many particulars. In the family, Aquinas says, children constitute such a good: “children are a common good of both husband and wife whose union exists for the sake of children.”⁹⁵

Froelich comments on this passage:

No child is the exclusive possession of either the mother or father, nor does the responsibility of his welfare fall to only one of them.... The child then is a

⁹² *S.T. I*, q. 39, a. 4. Cited in Froelich, 45. See also *In VII Metaph.*, lect. 13, n. 1571: “This is what Aristotle aims to disprove in this chapter by showing that animal in general or man in general is not a substance in reality, but that the form animal or man takes on this generality insofar as it exists in the mind, which understands one form as common to many inasmuch as it abstracts it from all individuating principles.”

⁹³ Froelich, 47.

⁹⁴ *Ibid.*, 43.

⁹⁵ *In VIII Ethic.*, lect. 12, n. 1724.

common good opposed to the parents' private good but not to their individual good. They each can say 'This is my child' and 'This is our child' without contradiction.⁹⁶

The parent cannot say, on the other hand, 'This child is mine alone,' which would be to claim a common good as a private good.⁹⁷

Goods common in causation may be either extrinsic or intrinsic ends. An extrinsic end "exists separately from what seeks it," and an intrinsic end "exists within that whose end it is."⁹⁸ The child in the previous example is an extrinsic end. Form, on the other hand, is an intrinsic end; it is part of the thing whose good it is, and it is the goal of generation and alteration. This is true of substantial forms (such as human nature), but also of accidental forms (such as physician): both serve as ends, as causes of action. The good of order, or "the form of a complex whole, is an intrinsic common good."⁹⁹

Froelich notes a third sense of *bonum commune* in the works of St. Thomas, which most often occurs as *bona communia*. For example, in distinguishing between distributive and commutative justice, Thomas says that the order directed by the former "distributes common goods proportionately."¹⁰⁰ These common goods (honors, money, etc.), which provide the matter for distributive justice, are common before distribution because they belong to no one in particular. After distribution, however, they are private goods.¹⁰¹ These goods are not ends in themselves, but they are not common in predication either; they are common by convention or law (rather than necessarily common) and are

⁹⁶ Froelich, 48-49.

⁹⁷ A widow could perhaps make this claim, that her child as hers alone, though insofar as other family members take some role in caring for the child, they also seem to have him as a good.

⁹⁸ Froelich, 50.

⁹⁹ Froelich, 51.

¹⁰⁰ *S.T.* II-II, q. 61, a. 1.

¹⁰¹ Froelich, 54.

means to an end. Therefore, Froelich calls them “common means” and “common goods of utility.”¹⁰²

Froelich explains that the political common good must be a good of the second kind, a good common in causation:

The common good is the good of the whole community. But since the political community is an ordered whole, not an organic whole or a disordered pile, its good consists in the preservation and tranquility of order ... The political order, then is a good for each citizen belonging to it. It is an intrinsic common good.¹⁰³

Froelich refers us to the *Treatise on Law* in defense of this claim. An objection in q. 90, a. 2 states that law cannot be directed to the common good, since “law directs man in his actions. But human actions are concerned with particular matters.”¹⁰⁴ In his response, Thomas agrees that actions have to do with particulars, but adds, “those particular matters are referable to the common good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the common end.”¹⁰⁵

Understanding the political common good as a good common by causation also helps explain why Thomas insists that this good is formally (and not just numerically) different from the particular good of the individual:

The common good of the realm and the particular good of the individual differ not only in respect of the *many* and the *few*, but also under a formal aspect. For the aspect of the *common* good differs from the aspect of the *individual* good, even as the aspect of *whole* differs from that of *part*. Wherefore the Philosopher says (*Politics* I.1) that “they are wrong who maintain that the State and the home and the like differ only as many and few and not specifically.”¹⁰⁶

¹⁰² Ibid., 54, 55.

¹⁰³ Froelich, 53.

¹⁰⁴ *S.T.* I-II, q. 90, a. 2, arg. 2.

¹⁰⁵ Ibid., ad 2.

¹⁰⁶ *S.T.* II-II, q. 58, a. 7, ad 2.

Thus, Thomas does not hold what is sometimes called the “aggregative” view of the common good.¹⁰⁷ The aggregative view of the common good is the idea that the common good of a society is the sum of the individual goods of the persons who make it up (the private good of A + the private good of B, etc.). In the aggregative view, there is no difference in kind between the common and the private good, but only a difference in number.

Thomas clearly rejects this view, which is incompatible with his understanding of the common good as a good desired by individuals precisely as a common good. In the aggregative view, the good desired by each individual is a private good, and even the common good is desired, not for its own sake, but because it includes the individual’s private good: A desires the common good because it includes A’s good. The aggregative view supposes that if ‘A’s good’ is a reason for A’s acting, then ‘A’s good + B’s good + C’s good’ will be an even stronger reason for A’s acting. This view does not explain why the sum of private goods would be a stronger reason for A’s acting than would A’s private good alone. The addition of the private good of another—which by the very fact that it is *the other’s* good, is not *his* good—does not make the common good any more desirable than A’s good alone.¹⁰⁸

The common good in the aggregative view is like the good common in predication; it does not exist as an object of desire, but only as an abstraction. This

¹⁰⁷ Mark Murphy argues that the aggregative view of the common good, which he finds the most compelling, does not commit one to a “maximizing” kind of deliberation. “The Common Good,” 163.

¹⁰⁸ See section B.2 in this chapter on Thomas’s view of proper goods.

abstraction is not a common cause, a common object of desire, a common end.¹⁰⁹ But individuals in the community do desire the political common good as an end. It is not necessary that all or even most individuals actually seek the common good as an end; as long as some do so, we must affirm that the political common good is a common cause. To say that the political common good is a common cause is to say that it exists in reality, but not that it is a separate reality with substantial existence. For Thomas, the political common good exists as an accident and not a substance. Yet because it exists in reality, and not only in predication, it can be desired by individuals, and in fact, it can be desired by individuals more than their particular goods, as we shall see.

In this section, we have seen that for Thomas a good may be common in three ways: in predication, in causality, or common by convention. The political common good is a good common in causation; it is a single good that is an end or final cause for many. Because the political common good is an end for each member of the political community, it is a proper good of each of these individuals. A proper good in this sense is a good that an individual desires on account of his nature; it is the end of a natural inclination. If the political common good were simply an aggregation of individual goods, it would be a good common in predication and not in causality. But a good common in predication is not desired as an end. Since the political common good is desired by individuals as an end, it must be a common cause, and not only a good common in predication. We must now investigate more closely the specific nature of the political common good.

¹⁰⁹ “Taken in the abstract, the common good *in praedicando* is not capable of being desired, and is not a good.” Michael Smith, “Common Advantage and Common Good”, 124.

D The Political Common Good

Since every sort of knowledge and decision pursues some good, what is the good that we say political science seeks? What, [in other words,] is the highest of all the goods achievable in action?

As far as the name goes, most people virtually agree; for both the many and the cultivated call it happiness, and they suppose that living well and doing well are the same as being happy. (Aristotle *Ethics* I.4.1095a14-19)

The political common good, Thomas has said, is the end of a natural human inclination. It is not a good common by predication, as human goods like the virtues are common, but a common cause of action for individual citizens in society. But what is it that individuals seek when they seek the political common good?

D.1. Happiness and the Political Common Good

At times, both Aristotle and Aquinas seem to say that the political common good is happiness. Both identify happiness as the highest good for man, and indeed for any intellectual nature.¹¹⁰ All men desire happiness as their last end, but they do not agree about what this highest good is, for some think it consists in wealth, others in pleasure, and others in virtue. But the most complete good, which most deserves the name happiness, is the good “which the man with well disposed affections desires for his last end.”¹¹¹ The man with “well disposed affections” (affections guided by reason) desires the end that is most complete, most enduring, and in every way best. Thus he rejects such goods as wealth, honor, glory, power, and bodily pleasures, as falling short of his highest

¹¹⁰ “For happiness is the proper good of every intellectual nature.” S.C.G. I, c. 100. See also S.C.G. III, c. 26.

¹¹¹ S.T. I-II, q. 1, a. 7.

good.¹¹² Happiness must be an activity of the highest human faculty, which is the intellect, and therefore “the life in accord with understanding” will be the best and happiest life.¹¹³ For the well-disposed man, then, happiness lies primarily in the operation of the speculative intellect, i.e., in contemplation.¹¹⁴ Secondly, happiness (the happiness obtainable in this life, at least) lies in moral virtue, or the “operation of the practical intellect directing human actions and passions.”¹¹⁵ Happiness, as Aristotle puts it, is an “activity of the soul in accord with virtue.”¹¹⁶

Like Aristotle, Aquinas says that happiness consists in an operation of the speculative intellect. But for him, the ultimate object of the speculative intellect is the divine essence, and happiness consists in the vision of this essence.¹¹⁷ This highest activity, possible only through supernatural help, is an even greater happiness than the life of understanding; though at the same time, it fulfills completely the desire to understand.¹¹⁸ Complete happiness can be obtained only in heaven:

For this reason in the present state of life, perfect happiness cannot be attained by man. Wherefore the Philosopher, in placing man’s happiness in this life (*Ethics* I.10), says that it is imperfect, and after a long discussion, concludes: “We call men happy, but only as men.” But God has promised us perfect happiness, when we shall be “as the angels . . . in heaven” (Matthew 22:30).¹¹⁹

¹¹² *S.T.* I-II, q. 2, aa. 1-8.

¹¹³ *Ethics* X.7.1178a7.

¹¹⁴ *S.T.* I-II, q. 3, a. 5.

¹¹⁵ *S.T.* I-II, q. 3, a. 5.

¹¹⁶ *Ethics* I.7.1098a17. Aristotle adds that to be complete, happiness must be in accord with the best and most complete virtue, over a complete life, and with sufficient external goods.

¹¹⁷ *S.T.* I-II, q. 3, a. 8.

¹¹⁸ “The ultimate perfection which the soul can attain, therefore, is, according to the philosophers, to have delineated in it the entire order and causes of the universe. This they held to be the ultimate end of man. We [i.e., believers in Christ], however, hold that it consists in the vision of God; for, as Gregory says: ‘What is there that they do not see who see Him who sees all things?’” *De veritate*, q. 2, a. 2.

¹¹⁹ *S.T.* I-II, q. 3, a. 2.

This difference between Aristotle and Aquinas about the possibility of perfect, uninterrupted, and eternal happiness is not trivial, but if the political common good *is* happiness, it is *temporal* happiness and not eternal happiness. Therefore, we must consider whether the political common good in Thomas's view could be temporal happiness.

In the passage cited at the beginning of this section, Aristotle suggests that the highest good achievable in action; that is, the political common good, is happiness. Again in *Politics* VII, Aristotle seems to presume that the goal of political science is happiness. There he says that one who would determine the best kind of government should first know “the most eligible life,” that is, the happiest life.¹²⁰ Further on, he asks whether the happiness of the individual is the same as the happiness of the state, and answers himself:

Here again there can be no doubt—no one denies that they are the same. For those who hold that the well-being of the individual consists in his wealth, also think that riches make the happiness of the whole state, and those who value most highly the life of a tyrant deem that city the happiest which rules over the greatest number; while they who approve an individual for his virtue say that the more virtuous a city is, the happier it is.¹²¹

Thomas also says quite clearly in one place, “Happiness is a certain common good.”¹²²

Yet happiness itself cannot be the common good, according to what we have said in the previous section. Happiness cannot be the end of political science in the sense of a final cause, because happiness is always the happiness of some individual. Like the

¹²⁰ VII.1.1323a15. Earlier in the *Politics*, however, the highest good achievable in action seems to be not happiness, but justice. In III.12, Aristotle argues that the end of a science is a good, and the greatest good is the end of the most authoritative science, which is political science, “of which the good is justice, in other words, the common interest.” He thus implies that justice or the common interest is the highest good achievable in action.

¹²¹ *Politics* VII.2.1324a7-13.

¹²² *S.C.G.* III, c. 39, n. 2.

virtues, happiness is a good common in predication and not common in causality. It does not exist in general, but only in a particular person. Therefore, we can say that happiness is the common good of the human species, but this means that each human individual desires his own happiness as an end, not that all human individuals desire a common happiness (unless we speak of the object of that happiness as God, who is both the good of each individual and of the whole, and who is neither a general nor a particular good, but goodness itself).¹²³

In his commentary on Aristotle's *Ethics*, Thomas explains why Aristotle rejects the idea of a common notion of the good (i.e., a universal, separated good) as that which makes man happy:

After the Philosopher has explained that there is no common idea of good, now he shows that even if there were, it would not follow that happiness would have to be sought according to it.... If there were one good univocally predicated of all, or even if a separated good did exist in itself, it would obviously not be a thing produced or possessed by man. Now it is precisely such a thing we are seeking. We are looking for the happiness that is the end of human acts. The end, however, of man is either some thing he does or some external thing.... Now it is clear that the common or separated good cannot be the operation itself of man, nor is it something produced by man.¹²⁴

The good in general does not exist, and even if it did, it could not be an end of human acts, for it is neither something that man does nor something that he makes, and the end of a human action is either an activity or a product. As we saw above, Aristotle and Thomas maintain that happiness is an activity, specifically the activity of the intellect in knowing the highest object. Insofar as happiness is common, it is common in predication only, for intellectual activity can only exist in the individual who is thinking (again, we

¹²³ "God Himself in reality is neither universal nor particular." *S.T.* I, q. 13, a. 9, ad 2.

¹²⁴ *In I Ethic.*, lect. 8, nn. 97, 98.

are speaking here of temporal happiness). When, therefore, Thomas says that happiness is a common good, he means that each person individually desires happiness: “Happiness is the end of the human species: as all men would naturally desire it. Therefore happiness is a certain common good which can come to be in all men.”¹²⁵

Earlier I put aside the question of eternal happiness and asked whether for Thomas the political common good might be a kind of temporal happiness. I argued that this is not compatible with his rejection of separated good. It was necessary to ask the question this way in order to rule out this possibility; yet it makes an artificial distinction. For Thomas, we cannot say that there are two ends for man, one eternal and one temporal. Man has one end, a supernatural end. Considered as the object of happiness—that which makes man happy—rather than the activity of happiness, Thomas does say that happiness is a good common in causality. This object, of course, is God, who is the common cause of human happiness. God is the common good of all in the way of causality and not in the way of predication. Thomas’s consideration of the political common good always presupposes the higher good in which man’s happiness consists. Yet political activity has its own specific object or intrinsic end, which is neither the object of happiness (God) nor the activity of happiness (contemplation).

Neither does the political common good consist in virtue. This is apparent in Thomas’s reply to the first objection of q. 92, a. 1. The objection says that it is possible for someone to act well regarding the common good, but to act poorly in other respects.

¹²⁵ “*Felicitas autem est finis humanae speciei: cum omnes homines ipsam naturaliter desiderent. Felicitas igitur est quoddam commune bonum possibile provenire omnibus hominibus, nisi accidat aliquibus impedimentum quo sint orbat.*” *S.C.G. III, c. 39, n. 2.*

We might think, for example, of a skilled military commander who is also an adulterer. If virtue is the common good, we must say that the commander does not serve the common good at all. In his response to the objection, Thomas says that since each man is part of the political community, he cannot be good unless he is “well proportioned” (*bene proportionatus*) to the common good;

nor can the whole be well established (*bene consistere*), unless its parts be proportionate to it. Consequently the common good of the state cannot flourish, unless the citizens be virtuous, at least those whose business it is to govern. But it is enough for the good of the community, that the other citizens be so far virtuous that they obey the commands of their rulers.¹²⁶

No one can be happy without virtue, but the common good does not depend on a society in which all the members are virtuous. The common good can flourish even if citizens lack virtue, though not if they are vicious. In obeying the commands of their rulers, citizens give what is due to each other and to the rulers. Thus, they act in accord with justice, even if they do so with difficulty and not out of a firm disposition. This is sufficient for the common good.

So the political common good is not happiness or virtue itself, but rather a kind of order. In the *Summa Contra Gentiles*, he refers to the “freedom from external disorders, to which the whole program of government in civil life is directed.”¹²⁷ Elsewhere, he says that “the peace of the state is good in itself,” even if some make bad use of it.¹²⁸ Civil peace is one of the conditions for living well, and for Thomas, peace does not only mean the absence of conflict. It denotes a two-fold order: the order of part to part, which is

¹²⁶ *S.T.* I-II, q. 92, a. 1, ad 3.

¹²⁷ *S.C.G.* III, c. 37, n. 7.

¹²⁸ *S.T.* II-II, q. 123, a. 5, ad 3.

directed by commutative justice, and the order of whole to parts, which is directed by distributive justice.¹²⁹

In another place, Thomas describes the political common good as justice: “the judge has care of the common good, which is justice.”¹³⁰ Although he uses the same word for justice (*iustitia*) as he does when treating the cardinal virtue, there is a difference. Justice “is only in one man towards another.”¹³¹ A moral virtue is a particular good and not a common good, as we saw above. Justice as the end of political science is not the virtue itself, which exists only in individuals. But we can speak of just things and just relations as well as just persons, and “a thing is said to be just, as having the rectitude of justice, when it is the term of an act of justice, without taking into account the way in which it is done by the agent.”¹³² For example, it is an act of justice for me to express gratitude to my parents. The thanks itself is the term of my act of gratitude, and can be called just. My relation to my parents, constituted by many such acts, can also be called just—a just familial order. The just civil order is constituted by many just acts between citizens. It is a civil community in which individuals give and are given their due. Peace, mentioned above, does not seem to be a separate end, but a quality of that just order.

If a just civil order is the intrinsic end of the political community, it also has an extrinsic end. We have already seen this distinction in the example of an army, where Thomas distinguishes between the intrinsic end or good of the army, which is its order, and its extrinsic end, which is the commander, and the victory willed by the

¹²⁹ *S.T.* II-II, q. 61, a. 1.

¹³⁰ *S.T.* I-II, q. 19, a. 10. See also *S.T.* I-II, q. 96, a. 3: “A lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace.”

¹³¹ *S.T.* II-II, q. 58, a. 2.

¹³² *S.T.* II-II, q. 57, a. 1.

commander.¹³³ In a question in the *Prima Pars* on the end of the government of the world (i.e., all creation), Thomas uses the distinction to answer the following objection:

Further, the good of the multitude seems to consist in order, and peace which is the “tranquillity of order,” as Augustine says (*De Civ. Dei* xix, 13). But the world is composed of a multitude of things. Therefore the end of the government of the world is the peaceful order in things themselves. Therefore the end of the government of the world is not an extrinsic good.¹³⁴

He replies that the intrinsic order of the world is truly its end; “this however, is not its ultimate end, but is ordered to the extrinsic good as to the end: thus the order in an army is ordered to the general, as stated in *Metaph.* xii, Did. xi, 10.” The extrinsic end of the universe is God.

Thomas reasons in the same way about the ends of political society. The extrinsic end of the army is found in the victory willed by the commander, and the extrinsic end of the universe is found in the will of its divine ruler. The intrinsic end of the political society is the civil order, but its extrinsic end is the happiness of each of the subjects, which is the right object of the ruler or rulers.¹³⁵

Consequently the law should consider principally the order which is for happiness (*lex maxime respiciat ordinem qui est in beatitudinem*). Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law should consider principally the order which is for common happiness (*lex proprie respiciat ordinem ad felicitatem communem*).¹³⁶

¹³³ *In XII Metaph.*, lect. 12, n. 2630.

¹³⁴ *S.T.* I, q. 103, a. 2, arg. 3.

¹³⁵ Aquinas places political science under the virtue of prudence (it is the highest form of prudence), and indeed sometimes uses the two terms interchangeably: “Wherefore prudence, or political science, is, in this way, the servant of wisdom; for it leads to wisdom, preparing the way for her, as the doorkeeper for the king.” *S.T.* I-II, q. 66, a.5, ad 1. “[P]rudence considers the means of acquiring happiness.” *S.T.* I-II, q. 66, a.5, ad 2.

¹³⁶ *S.T.* I-II, q. 90, a. 2.

Law has as its end not happiness itself, but an *ordo* that is conducive to happiness (the happiness of the members). And the happiness of the members is ultimately the same as the extrinsic end of the whole universe, God.

A few questions later, Thomas says that “the proper effect of law is to lead its subjects to their proper virtue.”¹³⁷ It is significant that he calls virtue the proper effect of law, rather than the final cause. Law is the cause of virtue, a particular good, only in an indirect way. The proper end of law is the common good. Yet “Law is necessary to make men virtuous,” and the good lawgiver wants to make men virtuous.¹³⁸ Good law is a condition for the formation of virtue, and virtue is a condition for happiness.¹³⁹ Therefore, it is a proper effect of law that men be made virtuous, which is a condition for their happiness, but neither virtue nor happiness are the intrinsic end of law.

Given, then, that the good intrinsic to the political community, a just order, is directed toward human happiness, it seems that the civil order is a means to the happiness of individuals. In this case, the individual good would take precedence over the common good. Yet Thomas clearly thinks that the political common good has precedence over the goods of individuals. How can the good of an accidental unity like society be a greater good than the good of a substance, an individual human person?

To this, Thomas says that while substance is simply more excellent than accident, “yet relatively some particular accident is more excellent than substance in so far as it

¹³⁷ *S.T. I-II*, q. 92, a. 1.

¹³⁸ *In X Ethic.*, lect. 14, n. 2154.

¹³⁹ In *S.T. I-II*, q. 3, a. 2, Thomas argues that since happiness must consist in an operation, rather than in a state of being (such as a habit), virtue is not the same as happiness.

perfects substance in some accidental mode of being.”¹⁴⁰ The human person, a substance, is more excellent simply than the political community, an accidental unity. But relative to man’s relation to his fellow man, the community is more excellent. When the individual man prefers the community’s good to his own, he is perfected in relation to others: in other words, he is perfected in his capacity as a social being, or perfected with regard to the virtue of justice. Thus the excellence of the community and its good is based on its ability to perfect the individual man. And in loving what perfects him, a man loves his own perfection, his own good, as well. Thus, the individual’s perfection in virtue is subordinate to the common good, but it is through seeking the common good that he is perfected in virtue.

Moreover, man’s happiness is a supernatural end which surpasses even the greatest of human goods, as Thomas points out in the question on virginity in the *Summa*. In the fourth article of this question, Thomas examines several objections to the thesis that virginity is a more excellent good than marriage. The third objection points out that “the common good takes precedence of the private good,” and that marriage is directed to the common good.¹⁴¹ As a social institution, marriage serves the political common good. It creates a structure in which men and women form stable unions, bear children, and care for them. Persons who marry serve the common good by adding to the membership of the community and providing for these new members who are unable to provide for themselves. Virginity, on the other hand, serves the individual good, in that it frees a

¹⁴⁰ S.T. I-II, q. 66, a. 4.

¹⁴¹ S.T. II-II, q. 152, a. 4, arg. 3.

person to devote himself to the things of God. Therefore, it seems that marriage is a more excellent good than virginity.

In his response to this objection, Thomas begins by affirming but qualifying its first premise: “The common good takes precedence of the private good, if it be of the same genus, but it may be that the private good is better generically. It is thus that the virginity that is consecrated to God is preferable to carnal fruitfulness.”¹⁴² Within any genus of goods, the common good is better than the private good. But goods belonging to different genera are not commensurable. Therefore, the principle does not apply. So even though marriage is directed to the common good, virginity is greater, in that it is directed to a divine good, which surpasses the genus of human goods.

Man’s supernatural good does not belong to the genus of human goods. Thomas maintains that within the genus of human goods, the political common good is the highest. In commenting on the same passage of the *Ethics* cited by his objector in the question on virginity, Thomas says that “even though the good be the same for one man and for the whole state, it seems much better and more perfect to attain, that is, to procure and preserve the good of the whole state than the good of any one man.”¹⁴³ Within any genus of goods, the good of the whole is preferable to the good of the individual part. In the genus of human goods, the greatest whole is the political community, for this community contains all other human communities. Therefore, in the genus of human goods, the highest good is the political common good:

¹⁴² *S.T.* II-II, q. 152, a. 4, ad 3.

¹⁴³ *In I Ethic.*, lect. 2 n. 30.

Then he [Aristotle] shows that the good to which the political community is directed is the supreme (*principalissimum*) human good, by the following argument. If every association is directed to a good, the supreme (*maxime*) association necessarily most seeks the supreme (*principalissimum*) human good. For the relative importance of means necessarily depends on the relative importance of ends. And what he adds, that the political community includes all the other associations, makes clear which association is supreme.

For an association is a whole, and wholes are ordered so that one that includes another is superior. For example, the wall of a house is a whole, but the house is a superior whole, since the wall is included in the house. And the association that includes other associations is likewise superior. But the political community clearly includes all other associations, since households and villages are included in the political community, and so the political association is the supreme association. Therefore, the political community seeks the supreme human good, since it aims at the common good, which is superior to, and more god-like than, the good of an individual, as Aristotle says at the beginning of the *Ethics*.¹⁴⁴

To make a comparison between two goods, the goods must be in the same genus, but human and divine goods belong to different genera, as Thomas argued in defense of the superiority of virginity. If we are talking about the political common good, which is a human good, we can only compare it to other human goods. But, according to Thomas, “it is impossible for any created good to constitute man’s happiness,” and therefore happiness is not constituted by a human good, but by God himself.¹⁴⁵ Therefore happiness, as the final end for which man acts, is incommensurable with the political common good.¹⁴⁶

Of course, the idea of the beatific vision takes Aquinas beyond the Aristotelian view of the common good. Is there a non-theological solution to the question of which good is higher: the political common good or happiness? In some places, Aristotle affirms that the political common good is the highest human good, but in others, he

¹⁴⁴ *In I Polit.*, c. 1, n. 2.

¹⁴⁵ *S.T. I-II*, q. 2, a. 8.

¹⁴⁶ God is the common good of all persons and of the whole universe, and God is neither a particular nor a universal. *S.T. I-II*, q. 109, a. 3; I, q. 13, a. 9, ad 2.

affirms that the highest human good is happiness.¹⁴⁷ At times, he seems to identify the political common good with happiness, but given his understanding of happiness, this could only mean a good common by predication, as I have shown above. If the political common good is a true end (common in causality), it is not happiness, but as Aristotle says in the *Politics*, justice.¹⁴⁸ Yet if the political common good is the highest human good, then the highest human good is not happiness, contra *Ethics* I. It seems that the only way to resolve this problem is by accepting, as Thomas does, that happiness does not consist in a human but a divine good. Aristotle comes close to doing this when he compares contemplation to divine activity in *Ethics* X: “And so the human activity that is most akin to the gods’ activity will, more than any others, have the character of happiness.”¹⁴⁹ Yet for Aristotle contemplation is only metaphorically a divine good, and so the tension between the political common good and the individual good of contemplation is ultimately unresolved.

We have seen that the political common good is not happiness. Happiness, Aristotle says, is an activity of the soul, namely contemplation. Its object is divine. Thomas is able to add to this understanding by saying that the happiness of man, this contemplative activity, is not only a godlike end, but is in fact divine. Human happiness is a contemplation of God which is also a union with him. Because this good is supernatural, it surpasses all human goods, including the political common good. Thomas maintains, however, that the political common good is a true good, and the highest of

¹⁴⁷ *Ethics* I.2, I.4; *Politics* I.1.

¹⁴⁸ *Politics* III.12.

¹⁴⁹ *Ethics* X.8.1178b23-24.

human goods. The intrinsic good of the political community the *tranquillitas ordinis*, the just civil order, which while it is not identical with happiness, is conducive to it. The extrinsic good of the political community is the happiness of each of the members of the community, which is found in God.

D.2. Love of the Political Common Good

In the passage cited at the beginning of this chapter, Yves Simon observes that there exists a wide consensus that it is right to demand personal sacrifice from some members of society for the common good. When we praise the fireman and the soldier for their actions in defense of the community, we praise their desire to pursue the good of the community, whether a town or an entire nation, at risk to their own bodily life. Nor do we consider that in so acting, they behave unnaturally. We might call their actions extraordinary, but not disordered. Moreover, it is common for firemen and policemen and soldiers, when asked to comment on their own heroism, to respond that they were merely doing what any decent fireman or policeman or soldier would do in the situation. From a Thomistic standpoint, this attitude suggests that it is in some sense *natural* to prefer the common good when a grave situation calls for a sacrifice of one's private good. It also suggests that it is natural to prefer the common good to the good of *another* individual.

But we must return to this idea of a natural inclination or natural desire to preserve the good of the community, since it requires some explanation. In the Thomistic framework, to say that something is good is to say that it is desirable. It is not part of my thesis to analyze or defend this view of the good, which I assume as a foundation for my

reflections. Insofar as any thing is desired, it is desired as a good. In this sense, all things that men desire are desirable. But only some things will answer man's natural needs, and such things are desirable in a narrower sense. We will focus on the narrower sense, since it is in this sense that Thomas says the individual naturally desires the common good more than his own particular good.

Thomas argues that it is both natural and praiseworthy for individuals to prefer the common good of society to their own individual goods.¹⁵⁰ Man naturally loves himself. While men tend to love themselves in a disordered way, self-love is not in itself disordered, and is in fact "the form and root" of other loves (thus we are told to love our neighbor as ourselves).¹⁵¹ Love for oneself, however, does not mean loving oneself as the object of love, but having a sort of friendship for oneself, by willing one's own good. In this way, one desires and does good things for oneself and takes pleasure in one's own company.¹⁵² This love is the basis for other loves, for "what is one with a thing, is that thing itself: consequently every thing loves what is one with itself."¹⁵³ In this way, a man loves with a "natural love" his parents, brothers, children, and all who are one with him "in the principle of natural generation."¹⁵⁴ And to those with whom he is one by a "non-

¹⁵⁰ In other words, his theory of the common good has both a descriptive and a normative element. That it is natural for men to prefer the common good of society to their own good is a descriptive statement, based on observation of how men tend to act. That it is praiseworthy for men to prefer the common good is a normative statement, for we praise someone for doing what he ought to do.

¹⁵¹ *S.T.* II-II, q. 25, a. 4: "Hence, just as unity is the principle of union, so the love with which a man loves himself is the form and root of friendship."

¹⁵² *S.T.* II-II, q. 25, a. 7.

¹⁵³ *S.T.* I, q. 60, a. 4. Some of Thomas's clearest statements about the naturalness of self-love are found in his *Treatise on the Angels*, from which this quotation is taken. Men and angels are both intellectual creatures, but in man, one has the problem of separating tendencies that are in him because of sin, and tendencies that are in him by nature. The (good) angels, on the other hand, are intellectual creatures uncorrupted by original sin, and so can be used as an example of proper self-love.

¹⁵⁴ *S.T.* I, q. 60, a. 4.

natural union,” he loves with a “non-natural” love; “thus a man loves his fellow townsman with a social love, while he loves a blood relation with natural affection.”¹⁵⁵ This is at first surprising from someone who so often compares the state to the human body, and who defends Aristotle’s position on the naturalness of the state. What does Aquinas mean by saying that the citizens are not one by a natural union? We can answer this question by recalling how he understands the state to be natural. He does not understand it to be a natural entity; this would be to take the bodily analogy too literally. Rather, the state is natural as the end of man’s natural social tendency.

It is natural for man to love all who are one with him; this follows from his natural love for himself, which by extension applies to all who are in some way one with him. Some are one with him naturally (by generation) and some are one with him socially (by rational order). It is natural for man to love his fellow citizens because they are one with him, but he is not one with them by nature, and so it is called a “social love.”

Loving other members of the community is not the same as loving the common good. A man loves another individual insofar as the other is one with himself, but he loves the common good insofar as he is part of the community:

Each part naturally loves the common good of the whole more than its own particular good. This is evidenced by its operation, since the principal inclination of each part is towards common action conducive to the good of the whole. It may also be seen in civic virtues whereby sometimes the citizens suffer damage even to their own property and persons for the sake of the common good.¹⁵⁶

What evidence is there that the part does indeed prefer the good of the whole to its own good? Thomas himself does not give us many illustrations. In a number of places, he

¹⁵⁵ Ibid.

¹⁵⁶ *S.T.* II-II, q. 26, a. 3.

compares the act of self-sacrifice for the civic common good to the act by which a man sacrifices a lesser part of his body to protect a greater, for example “when someone exposes his hand to a sword to defend his head on which his whole body’s health depends.”¹⁵⁷ This example seems to indicate that he is thinking primarily of the operation of parts of *per se* wholes. The hand, the foot, the heart, the stomach, all operate in a way that serves the whole, whether by voluntary or involuntary operation (e.g. by obtaining food or by digesting it). In accidental wholes, we should expect the operation of the part for the good of the whole to differ, since the wholes themselves differ so greatly.

When someone exposes his hand to protect his head, the hand’s action is based on “a kind of natural inclination” by which a part “works for the good of the whole, even to its own danger and detriment.”¹⁵⁸ Similarly, “according to this natural inclination and according to political virtue, the good citizen faces the danger of death for the common good.”¹⁵⁹ Though the two acts are similar, Thomas stops short of saying that it is strictly *natural* for man to sacrifice his life for the community. His act accords with “a kind of natural inclination”—the inclination of the part to work for the good of the whole—but it is also a matter of political virtue.

The character of self-sacrifice for the political common good is clearly expressed in a question on whether angels (and also men) naturally love God better than themselves. Thomas argues that angels naturally love God, the universal common good,

¹⁵⁷ *Quodlibetal Questions 1 and 2 in Medieval Sources in Translation*, v. 27, trans. Sandra Edwards (Toronto: Pontifical Institute of Mediaeval Studies, 1983), *Quodl.* 1, q. 4, a. 3.

¹⁵⁸ *Quodl.* 1, q. 4, a. 3.

¹⁵⁹ *Ibid.*

more than their private goods. This preference is found in all natural things that belong to something else:

Now, in natural things, everything which, as such, naturally belongs to another, is principally, and more strongly inclined to that other to which it belongs, than towards itself. Such a natural tendency is evidenced from things which are moved according to nature: because “according as a thing is moved naturally, it has an inborn aptitude to be thus moved,” as stated in *Phys. II*. For we observe that the part naturally exposes itself in order to safeguard the whole; as, for instance, the hand is without deliberation exposed to the blow for the whole body’s safety.¹⁶⁰

Here again we find the comparison between the hand’s protection of the head and the individual’s protection of the community. But while one exposes one’s hand to danger “without deliberation,” risking one’s life for the common good is a deliberate act:

And since reason copies nature, we find the same inclination among the social virtues; for it behooves the virtuous citizen to expose himself to the danger of death for the public weal of the state; and if man were a natural part of the city, then such inclination would be natural to him.¹⁶¹

Thomas does not deny that man is part of the city or that he has an inclination to self-sacrifice. But if man were “a natural part of the city,” in the way that the hand is a natural part of the body, then the inclination to sacrifice his private good would not require deliberation. Since, however, the political society is not a natural unity, but a unity of order, man is not a natural part of the city, and he must deliberate about whether to sacrifice his private good for that of the community. It is, however, necessary for the perfection of his will that he will the common good, and refer whatever particular goods he wills to that common good: “a man’s will is not right in willing a particular good,

¹⁶⁰ *S.T. I*, q. 60, a. 5. The natural tendency refers to all natural things, from stones to animals, which tend to move or be moved in certain ways. The doctrine of natural places is one implication of this, but Thomas’s point here does not depend on it. In the previous sections, I have focused on natural tendencies in animals, as a more acceptable point of reference for talking about the common good.

¹⁶¹ *S.T. I*, q. 60, a. 5.

unless he refer it to the common good as an end: since even the natural appetite of each part is ordained to the common good of the whole.”¹⁶² A man may pay his debts so that he will not be thrown in prison; he wills a particular good without referring it to the common good. A man may also pay his debts because he wills justice and the good of the community. The latter is more perfect because he refers the particular good (not being thrown into prison) to the common good.

When Aquinas says that it is natural for man to prefer the common good, he does not mean it is automatic. Thus he makes this qualification: a man naturally loves the common good, *considered formally*, more than his own good. Materially, he may will a singular good above the common good. The reason for this is that “a thing may be considered in various ways by the reason, so as to appear good from one point of view, and not good from another point of view.... Thus a judge has a good will, in willing a thief to be put to death, because this is just: while the will of another—e.g., the thief’s wife or son, who wishes him not to be put to death, inasmuch as killing is a natural evil, is also good.”¹⁶³ In the example, the thief’s wife can still be said to love the common good considered formally (she does not desire the dissolution of society), but materially she does not, because she does not will the means that the judge has determined to be necessary for the common good. Instead, “the thief’s wife has to consider the private good of the family, and from this point of view she wishes her husband, the thief, not to be put to death.”¹⁶⁴

¹⁶² S.T. I-II, q. 19, a. 10.

¹⁶³ S.T. I-II, q. 19, a. 10.

¹⁶⁴ Ibid. See Yves Simon, “Common Good and Common Action.”

As part of the city, therefore, man has an inclination to prefer the community's good to his own, but this inclination must be perfected by the social virtues. It is according to practical reason (prudence) for man to prefer the common good of the political community because this is perfective of him. How does love of the common good perfect the individual man? In answer to this, it will be helpful to look at Aristotle's analysis of self-love in the *Ethics* (IX.8). Self-love, he says, is rightly condemned in the sense of desiring a disproportionate measure of wealth, honor, and physical pleasure for oneself. The material good of the individual is often opposed to the common good. However, if someone loves himself by desiring to acquire virtue for himself, no one would condemn this man as a lover of self.¹⁶⁵ Or, as Aquinas comments, "if some wise man should call him self-loving, he will not say this in censure."¹⁶⁶ The goods of virtue are in reality better than the goods that most men desire, such as money and honor. Therefore, if one "should wish to abound in goods of reason, i.e., virtuous actions," that person will be loving himself more than one who seeks to amass great wealth and honors.¹⁶⁷ Insofar as acting virtuously means preferring the common good to one's own good, a man who prefers the common good will in fact be loving himself more than one who ignores the common good and seeks only his private good. But acting virtuously does mean acting for the common good. Aristotle goes on to say in the same chapter:

When everyone strains to achieve what is fine and concentrates on the finest actions, everything that is right will be done for the common good, and each person individually will receive the greatest of goods, since that is the character of

¹⁶⁵ *Ethics* IX.8.1168b28.

¹⁶⁶ *In IX Ethic.*, lect. 8, n. 1865.

¹⁶⁷ *Ibid.*

virtue. And so the good person must be a self-lover, since he will both help himself and benefit others by doing fine actions.¹⁶⁸

Virtuous actions serve at the same time the good of the individual agent and the common good, when the good of the individual is understood as a life according to reason and virtue. Thus the same actions perfect the individual and serve the common good.

Aristotle goes on to consider the case where the common good calls for the sacrifice of one's own private good. He says of money, honors, and offices that the virtuous man "will sacrifice them all for his friends," and in doing so will obtain the better good (virtue) for himself.¹⁶⁹ This disposition extends to the most complete of sacrifices, for "the excellent person labors for his friends and for his native country, and will die for them if he must."¹⁷⁰ In doing so, he chooses what is best for himself. Even if he dies, he seems to choose "a single fine and great action over many small actions."¹⁷¹ In dying for country or friend, man loves himself more than another and seeks his own good more than the good of another.¹⁷²

Thomas says more about why this is so, emphasizing not only the virtuousness, but the naturalness, of loving the common good:

He that seeks the good of the many, seeks in consequence his own good, for two reasons. First, because the individual good is impossible without the common good of the family, state, or kingdom. Hence Valerius Maximus says (*Fact. et dict. memor.* IV.6) of the ancient Romans that "they would rather be poor in a rich empire than rich in a poor empire." Secondly, because, since man is a part of the home and state, he must needs consider what is good for him by being prudent about the good of the many. For the good disposition of parts depends on their

¹⁶⁸ *Ethics* IX.8.1169a9-13.

¹⁶⁹ *Ethics* IX.8.1169a30.

¹⁷⁰ *Ethics* IX.8.1169a19-20.

¹⁷¹ *Ethics* IX.8.1169a25.

¹⁷² "But a man loves himself more than another: because he is one with himself substantially, whereas with another he is one only in the likeness of some form." *S.T.* I-II, q. 27, a. 3.

relation to the whole; thus Augustine says (*Confess.* III.8) that “any part which does not harmonize with its whole, is offensive.”¹⁷³

In loving the political common good, the individual loves not the good of another (*bonum alienum*), but a good that is proper to him, since he is after all a part of the community which is the object of his love. In loving the community’s good, therefore, he loves his own good as well:

Even as part and whole are somewhat the same, so too that which pertains to the whole, pertains somewhat to the part also: so that when the goods of the community are distributed among a number of individuals each one receives that which, in a way, is his own.¹⁷⁴

For example, the policeman who risks his life and safety is one of the beneficiaries of the security which his police work provides. Thus in protecting the community, he is at the same time protecting himself.

If it were unnatural to love the common good above one’s own life, it could not be praiseworthy, since “whatever is contrary to the natural order is vicious.”¹⁷⁵ If the common good were not naturally desired above the particular good, then to desire it as if it were would be to have a disordered desire. To praise actions prompted by this desire would be to praise disordered acts, and if virtues such as bravery required one to love the common good more, it would follow that virtue required us to act against nature. “But nothing natural is perverse; therefore it is impossible for any natural inclination of love to be perverse.”¹⁷⁶ If it were not natural for man to seek the common good, it could not be virtuous. Virtue does not destroy or supplant, but perfects natural inclinations.

¹⁷³ *S.T.* II-II, q. 47, a. 10, ad 2.

¹⁷⁴ *S.T.* II-II, q. 61, a. 1, ad 2.

¹⁷⁵ *S.T.* II-II, q. 142, a. 1.

¹⁷⁶ *Quodl.* 1, q. 4, a.3.

While in loving the common good of society, the individual loves himself in the correct way, this does not make the good he loves a private or particular good. There is a difference between loving the political common good as one's own good (i.e., a proper good) and loving it as if it were a private good:

Loving the good of some city in order to *posses* and to own it does not make a good citizen; that is how a tyrant loves the good of a city, in order to control it. In such a case, in fact, he loves himself more than the city, for he covets this good for himself rather than for the city. To love the good of a city in order to *preserve* and defend it is to love it in a real sense, and this makes someone a good citizen, in that some people are prepared to subject themselves to the risk of death in order to preserve or increase the city's good, and to ignore their own personal good.¹⁷⁷

The tyrant loves the common good as his own *private* good. A good ruler or a good citizen also loves the common good as his good, but not as his private good. He is willing to sacrifice his private good for the common good, because he loves it more than his private good.

While the common good of society is not opposed to the particular goods of individual persons, this does not rule out all conflicts between common and private goods, as we saw in the example of the thief's wife. In his account of the love man has for the common good of political society, Thomas takes a middle road between two extremes: the identification of the common and the particular good, and the opposition of the common and the particular good.¹⁷⁸ There are two ways of identifying the common and the particular good. If two goods are to be identified, then in essence one of the goods has to disappear. The first option is to reduce particular goods to the common

¹⁷⁷ *De caritate*, a. 2.

¹⁷⁸ Hereafter, I use particular good to mean the individual human goods in contrast to the political common good, and not the good of happiness.

good: by virtue of being a part of political society, the good of the individual is the good of the state. The second option is to reduce the common good to the good of individuals: the common good is simply a sum of individual goods. In contrast to these two reductions, Thomas maintains that the two goods are distinct, but not opposed. The particular good of one person is distinct from the common good of the society. It is possible for someone to act in a way that serves his particular good and that does not serve the common good. But the individual person cannot achieve his particular good without serving the common good. And the common good cannot be achieved without the good of individual persons.

The different goods proper to man are not opposed in themselves, but they may be opposed in particular instances, because of the limitations that are part of human life. The proper good of man as citizen, i.e., the political common good, may be opposed in a particular instance to his proper good considered in another respect, as when a man leaves behind his family and work and other interests for the sake of defending the community in time of war. If there were no hierarchy among goods, the choice of one human good over another would be arbitrary. But for Thomas, as we have seen, there is an order to these goods, such that it is both natural and virtuous to prefer the common good.

At the same time, such a preference may entail great individual sacrifice. A person may never actually enjoy the good for which he sacrificed his private good. This is most clearly the case when a man gives his life for the good of the community. By the very act in which he serves the good of the community of which he is part, he ceases to

be part of that community. How does Thomas resolve this problem? First, he tells us that it is impossible for a person to be virtuous unless he loves the common good above his private good.¹⁷⁹ If, in an extreme case, virtue demands that one sacrifice one's life, the virtuous man will prefer to die than to act against virtue. This does not, however, resolve the difficulty. It only shows that in certain cases, the difficulty must arise. A true resolution requires reference to eternal life. Twentieth-century Thomist Jacques Maritain expresses this point clearly:

When man gives his life for the community's sake, he accomplishes, through an act of such great virtue, the moral perfection by which the person asserts his supreme independence as regards the world. By losing himself temporally for the city's sake, the person sacrifices himself in the truest and most complete fashion, and yet does not lose the stakes; the city serves him even then, for the soul of man is not mortal, and there is an eternal life.¹⁸⁰

The solution described by Maritain requires faith in life beyond death, and we might also add, faith in a final judgment. In light of this faith, a sacrificial act of virtue is not only good for the community; it is good in the end for the person who makes the sacrifice. However, this is more than can be known through philosophy, so it seems that a purely philosophical understanding of the priority of the common good has this limitation, that in some situations, it is unable to reconcile the private good of individuals with the common good.¹⁸¹ In many circumstances, there is no conflict between a man's desire of the common good and of his own good.

¹⁷⁹ See *In IX Ethic.*, lect. 8, 9 (treated above).

¹⁸⁰ *Scholasticism and Politics*, 75-76.

¹⁸¹ Another way in which this limitation appears is in the possibility of contemplation, the activity that defines happiness for Aristotle and Aquinas. Yet it is impossible for a human life to be occupied solely in contemplation; physical toil, sleep, eating, and other less noble activities are all necessary for human life. This is equally true of the state. It is impossible for all the members of the state to be occupied in contemplation; some must be involved in manual labor, trade, war, etc. These activities are directed toward

So far we have been considering Thomas's defense of loving the common good more than one's *own* private good, and the sacrifice of one's own good for that of the community. How does he justify loving the common good more than another's private good, and sacrificing another's good for the community? He makes the same claim about the priority of the common good in this case, the common good is more intrinsically desirable than the private good, whether one's own or another's. On the other hand, while the private person may make personal sacrifices for the common good, he may not sacrifice another for the common good: "It is lawful for any private individual to do anything for the common good, provided it harm nobody: but if it be harmful to some other, it cannot be done, except by virtue of the judgment of the person to whom it pertains to decide what is to be taken from the parts for the welfare of the whole."¹⁸² The private person may not even inflict bodily harm on himself for the common good, at least not by his own authority. A murderer is not justified in committing suicide, or a thief in cutting off his own hand.¹⁸³ One might consider a case in which a private person is commanded to inflict a punishment on himself, such as Socrates being sentenced to drink hemlock. In this case, however, the private person is not acting as a private person. He acts by authority of the state; it just happens that the public office of executioner resides in the person who is to be punished.

the life of contemplation as their end, but again it seems that the private good of some of the members is completely sacrificed to the common good. Again, the solution for Thomas is a theological one. For even the highest of merely human activities is to be directed to a higher activity, knowing and loving God. This supreme happiness, found in the activity of seeing (i.e., knowing) God, is available to all, no matter what intellectual capacity or state of life.

¹⁸² *S.T. II-II*, q. 64, a. 3, ad 3.

¹⁸³ *S.T. II-II*, q. 64, a. 5; q. 65, a. 1.

While punishment deprives the offender of a material good, it does not (cannot) deprive him of his spiritual good. Punishment may take away some of the things that can be used in a virtuous way, but it does not take away virtue itself. We have seen that love of the common good is necessary to human perfection, and that the man who prefers the common good to his own good is at the same time loving himself more perfectly than the one who prefers his private good to the common good. Unlike the man who sacrifices himself for the common good, the civil offender is pursuing neither the good of the community nor his own true good. By his crime, the wrongdoer has violated not only the common good, but also his own good. The judge, Thomas says, punishes “not out of hatred for the sinners, but out of the love of charity, by reason of which he prefers the public good to the life of the individual.”¹⁸⁴

By refusing to submit to the order that constitutes the community, he has put himself outside of the community. The punishment externally removes him from the community: whether temporarily by imprisonment, or permanently by exile, death, or life sentence. At the same time, since the political community is not a natural whole but a whole of order, the individual who has separated himself from the community may always be reunited to it, as long as he lives. Since it is good for the whole that all its parts be present, it is in the interest of the whole that separated parts be reconciled with the whole. If, however, this appears unlikely, and the person who has separated himself from the community poses a threat to other members, Aquinas maintains that the superior good of the community is the guiding end:

¹⁸⁴ *S.T.* II-II, q. 25, a. 6, ad 2.

The goodness of any part is considered in comparison with the whole; hence Augustine says (*Conf.* III) that “unseemly is the part that harmonizes not with the whole.” Since then every man is a part of the state, it is impossible that a man be good, unless he be well proportionate to the common good: nor can the whole be well consistent unless its parts be proportionate to it.¹⁸⁵

It must be noted that, in contrast to some interpretations (see Chapter IV.C), the political common good is not threatened by the very existence of the evildoer, but by actual or imminent injustice. Those who have charge of the community as a whole have a responsibility to protect that community, to protect all its innocent members, which is greater than their responsibility to protect the life of the individual evildoer. If in some cases, it is not possible to preserve *both* the life of the criminal and the lives of innocent persons, civil authority rightly chooses the latter.

In this section, we have seen that the common good is naturally more desirable than the private good of the individual, where private good is understood as the material and incommunicable good of the individual. Since the good of the whole is by nature greater than the good of the part, it is natural for the individual to prefer the common good. When an individual desires the common good, however, he desires something that is really his good, but that is also a good for others. He has a natural inclination to prefer the common good, for the very reason that he perceives this good as greater than his own good.

E Conclusion

¹⁸⁵ *S.T.* I-II, q. 92, a. 1, ad 3.

Thomas's justification of capital punishment depends on his understanding of the common good of political society, which I have explicated in this chapter. The main tenets of this view are the following:

1. A political society is an integral and accidental whole, composed of individual persons as parts.
2. The political common good is prior to the private good of the individual member.
3. The political common good is a proper human good.
4. The political common good is a just and peaceful order.
5. It is natural and virtuous to prefer the political common good to one's individual good.

That the political community is a whole was shown in the following way: Whatever has unity of form is an integral whole. The political community has unity of form (its government is the form that unites it). Therefore, the political community is an integral whole, and its parts are the individuals who belong to it.

Thomas further distinguishes the political community as an accidental whole. An accidental whole is unified by an order imposed by reason. The political community is unified by a particular form of government, which is an order imposed by reason. Therefore, it is an accidental whole. This avoids the error of those who would make the state an organic entity or a substance. For Thomas, the political community is not a substantial whole, but an accidental whole.

The whole is greater than its part. This is a truth understood as soon as the meaning of the terms is known, according to Thomas. This "greater" can be explained more precisely as a kind of priority. The whole is prior to its parts as a complete reality and formal cause, since the form of the parts depends on the form of the whole. This principle is true of all wholes, but it is true of different kinds of wholes in different ways.

An organic whole is absolutely prior to its parts. The parts of an organic whole are dependant on the whole for their existence and operation; apart from the whole, they do not exist or act. An accidental whole is also prior to its parts, but relatively. Its parts exist and have operations apart from the whole. It is not in terms of their being, therefore, that the parts are posterior to the accidental whole, but in terms of their order to a certain end.

Within any genus, the common good is prior to the particular good. The genus of human goods includes both the private goods of individuals and their common good as a political whole. Within the genus of temporal human goods, the common good of political society is prior to the good of the individual member of political society. Yet since the good of the whole cannot be achieved without the good of the parts, it follows that the political common good cannot be achieved without the good of the individual citizen.

Thomas also maintains that the individual members cannot achieve their own good without seeking the common good, i.e., that the political common good is one of man's proper goods. Since the common good is part of man's natural perfection, it is natural for him to desire it. In fact, Thomas says, it is natural for him to desire this good more than his individual good, recognizing its superiority. However, this natural inclination, like all inclinations, is subject to excess and deficiency, and must be perfected by moral virtue. Virtuous love of the common good means loving the good of the community more than one's own individual good (when these goods are in the same genus).

What is most characteristic of Thomas's view of the common good (though not original) is the harmony between the good of the whole and the good of the parts. On the one hand, he consistently affirms the priority of the good of the whole, even to the point of cutting off an offender from this whole by death. On the other hand, he insists that individuals' well-being is essential to the good of the whole. There are two kinds of threat to this harmony between whole and part. First, there is the man who voluntarily sacrifices his life to protect and defend the community. In so doing, he is pursuing a good that is objectively greater than his private good. In pursuing the good of the community, he is also pursuing his own good as part of the community. Yet this man represents a kind of contradiction, because in the very act of defending the community, he ceases to belong to it. Only a theological explanation (the continuation of life beyond death and the expectation of a final judgment, when all good is rewarded and all evil punished) finally resolves the conflict between the common good and the individual good. Those who preferred the good of the community to their own good enjoy the fullness of life in a perfect community, the society of the blessed.

The other kind of threat to the harmony between whole and part is when a particular part becomes a threat to the whole. Capital punishment is the forced removal of a member of a community for the good of the whole community. Again, the common good is greater than the private good of the member, but here the sacrifice is not voluntary on the part of that member. Yet if it is better to prefer the common good to one's own private good, it is also better to prefer the common good to another's private good. To kill a member of the community is to harm the whole community. This is only

justified when there is no other way to save the whole. The power to inflict harm on the community, for the good of the community, rests with the whole community or with those who represent the whole community. The power to kill evildoers rests then with public authority and not with private persons. When the public authority inflicts harm (either death or some lesser form of harm) on a member of the community, he does so for the good of the community, in order to restore the just order which is the essence of that community.

Chapter IV: Philosophical Objections to the Thomistic Account of Capital Punishment

In this chapter, I will address some important philosophical objections to Thomas's account of capital punishment, which he did not himself address or which he addressed only implicitly. I will not address every objection, but only those Thomas would have to acknowledge as reasonable objections to his position. Some objections to a position are really incommensurable with the theory they object to, because they begin with entirely different premises. There is no common principle to which the two parties can refer. So, for example, there would be no rational way to answer an objection based on a denial that it is good to give to others their due.¹ The first three objections have to do with the consistency of Aquinas's account. They do not take issue with the general premises, but with the applications of those premises. The second three objections go deeper, in that they object to one of the premises, but only by reference to other premises which Aquinas held (and held more firmly than the objectionable premise).

The first objection is that Thomas's justification of CP in the case of heresy contradicts his general justification of CP:

Objection 1) An offense should be punished by the order against which it acted. Since heresy is an offense against the divine order and not the order of justice (the civil order), it should be punished by the divine and not the civil order.

The second objection is that Thomas's justification of CP does not fulfill his criterion of utility in punishing:

¹ See Alasdair MacIntyre, *After Virtue*, 8.

Objection 2) Good (human) punishment is useful to the common good. CP is not useful to the common good (or is less useful than other punishments), and therefore CP is not good punishment.

The third objection is that his account fails to preserve the criterion of equity:

Objection 3) Punishments that are necessary to preserve equity are part of any good society. CP is necessary to preserve equity, and so CP is part of any good society.

We have seen how important Thomas's theory of the common good is to his theory of capital punishment. If the former is incoherent, then his justification of CP is doubtful.

Objections Four and Five are criticisms of Thomas's theory of the common good, particularly of the priority he assigns to this good over the good of individuals. The fourth objection questions the notion of individual persons as parts of a whole:

Objection 4) The human person is not a part of society, but only a part can be disposed of for the good of the whole, and therefore the person cannot be disposed of for the good of the whole society.

The fifth objection questions his view of the common good of political society as a greater or prior good to the good of individual citizens:

Objection 5) The political common good is merely an instrumental good, which is directed toward the good of individuals. An instrumental good cannot be a greater good than the good toward which it is directed, and so the common good is not greater than the individual good.

Probably the most far-reaching objection to Thomas's account, however, is the rejection of his justification of the act of killing as punishment:

Objection 6) Capital punishment is clearly an act of intentional killing. But intentionally killing a human being is always wrong. Therefore, CP is wrong.

If this objection succeeds, Thomas's whole understanding of the ethics of killing must be revised, if not discarded. This may also have implications of his justification for other

forms of punishment such as maiming and imprisonment, which he perceives as intentional harm inflicted on another, which is injustice when done by a private person and justice when done by a public authority as punishment for evil.

A First Objection: Thomas is Inconsistent in Condoning CP for Heresy

Thomas argues that an evildoer should only be executed when he presents a serious threat to the common good; that is, to the political common good, which is a just social order. Therefore, one might also object to his defense of CP on the basis of his justification for punishing heretics with death: an offense should be punished by the order against which it acted. Since heresy is an offense against the divine order and not the order of justice (the civil order), it should be punished by the divine and not the civil order. Even though this objection has to do with offenses against faith, it is mainly a charge of internal inconsistency in Thomas's thought, and therefore a philosophical objection.

As we have seen, Thomas says that human law should not repress every act of vice, "but only the more grievous vices ... and chiefly those that are to the hurt of others."² On the other hand, he defends civil society's right to use the death penalty as a punishment for heretics:

On their [the heretics] own side there is the sin, whereby they deserve not only to be separated from the Church by excommunication, but also to be severed from the world by death. For it is a much graver matter to corrupt the faith which quickens the soul, than to forge money, which supports the temporal life. Wherefore if forgers of money and other evil-doers are forthwith condemned to death by the secular authority, much more reason is there for heretics, as soon as

² *S.T.* I-II, q. 96, a. 2.

they are convicted of heresy, to be not only excommunicated but even put to death.³

The 13th century saw a growth of heretical movements, which were a cause of anxiety for ecclesiastic and secular authorities.⁴ As heretical groups like the Cathars grew in number and in power, the popes responded with increased severity. Innocent III launched the Albigensian Crusade, in which 7000 people were killed in one action at Bèziers. Pope Gregory IX incorporated into canon law the legitimacy of burning at the stake as a punishment for heresy. Under Gregory's reign, the Dominican Robert le Bougre burned as many as 183 Cathars at a time in France. Pope Innocent IV issued a bull that charged the secular state with the duty of eliminating heresy as its chief duty.⁵ Some have concluded that Aquinas must have been so influenced by this situation, and especially by the Church approval of punishing heretics with death, that he could have come to no other conclusion about the legitimacy of CP in such cases:

This was the ominous setting in which Thomas Aquinas had to do his theorizing about the death penalty, and that fact cannot safely be set aside in reading him ... By mid-century a sea change had occurred, and the use of capital punishment for heresy was no longer a subject open to academic debate.⁶

Of course, one might accept Thomas's principles justifying the death penalty in general, but reject his application of them to heresy. The difficulty with this approach, however, is that it leaves one in the uncomfortable position of maintaining that the principles justifying the death penalty were grossly misapplied by the very person who best

³ *S.T.* II-II, q. 11, a. 3. According to Aquinas, there are two punishments for heresy. The first, excommunication, is given by the Church, with the hope that the offender will realize his error. (ad 3) But the one convicted of heresy by the Church may then be turned over to the civil authority to receive the punishment demanded in civil law.

⁴ Megivern, 108.

⁵ Megivern, 107-110.

⁶ Megivern, 111.

articulated these principles. One might well be led to conclude from this that the principles are themselves faulty. It remains to be seen, however, whether we ought to judge Thomas's justification of the death penalty for heresy as a gross misapplication.

Response to the First Objection

Charles Journet, the twentieth-century cardinal and theologian who was influential in composing the Vatican II document *On the Church in the Modern World*, provides an answer to this objection. In his *Church of the Word Incarnate*, Journet addresses the question of heresy and the death penalty.⁷ His primary concern in this work is to explain how the holiness of the Church is compatible with a Church policy of turning heretics over to the state for execution. In defending the holiness of the Church, Journet explains the unique character of the political order in the Middle Ages, and how heresy was a particularly dangerous attack on this order. In other words, although heresy is not an offense against the civil order in modern democracies, it was in mediaeval Christendom. Thus given the legitimacy of the death penalty in general, it is reasonable to apply it to crimes of heresy.

Journet explains the mediaeval response to heresy as a function of its “consecrational” regime. A consecrational Christian regime is a political unity made up of visible members of the Church, in which “Christian values permeate the whole political order; the notion of Christianity, of visible membership of the Church, enters

⁷ Journet, *The Church of the Word Incarnate: An Essay in Speculative Theology*, 281-283.

into the very definition of the citizen.”⁸ The Christian consecrational regime is a kingdom made up of members of the Church, but more than that, it is a regime in which Christianity forms an integral part of the political order. The mediaeval civil order is founded on Christian principles.⁹ Spiritual values make up part of the temporal common good: “to the degree to which the constitution of the medieval society recognized the faith as a value intrinsic to its common good, it is clear that the Church could require the faith to be defended with all the machinery used by cities in defense of their common good.”¹⁰ In this kind of society, there remains a distinction between spiritual and temporal power, but, as the superior power, the spiritual power also acts as part of the political realm.¹¹

Journet’s argument does not imply that the consecrational regime is the best political arrangement; this is certainly not the view that appears in *Gaudium et spes*. Yet Thomas’s reasoning about CP was reasoning about a relative determination of natural law, and therefore had to work with the actual constraints of his political and social context. In the mediaeval consecrational regime, though non-Christians were not citizens, they had legal status, and could legitimately exercise authority over Christians.¹² The heretic or schismatic was a different matter: “Those who, having first been Christians, afterwards broke with the Church, as heretics or schismatics, constituted a much greater danger—they shook the very bases of the new society and appeared as enemies of the

⁸ Journet, 214-215.

⁹ Journet, 280.

¹⁰ Journet, 250.

¹¹ Journet, 223.

¹² Journet, 226. See *S.T.* II-II, q. 10, a. 10, and q. 12, a. 2: Divine law does not annul human law, so membership in the Church does not override the natural authority of parent over child or king over subject.

public safety.”¹³ So the punishment of heresy was not only a matter of orthodoxy, but of civil order. Heresy was a public crime, since it promoted religious disunity, and religious unity was the foundational bond of society.¹⁴ Not only was it a public crime, but it was one of the most egregious:

If ... the death penalty is provided for the highest crimes against the temporal good of society, it is clear that the secular arm could punish the heretic with death, and that the Church, at need, could remind it of its duty; and more readily on this point than on others, since what heresy destroys is the faith, the supreme political value in a consecrational regime.¹⁵

Heresy in the Middle Ages would be comparable the crime of a Benedict Arnold or a Julius Rosenberg. It undermined the very existence of the political community.

Journet helps explain the political significance of heresy in this kind of regime in a general way. In practice, we must admit that the matter was more complicated. The real concern for civil authority in the thirteenth century was not so much heresy in itself, but the social and political effects of heretical movements: assassinations, violent mobs, fortified cities held by heretical leaders, semi-military Catholic groups formed to combat the heretical sects. Emperor Frederick II made heresy punishable by death in civil law, and later Pope Gregory IX sanctioned this punishment in canon law (it was, of course, the role of the Church to determine whether a person’s statements were heretical, not to execute heretics).¹⁶ A number of papal inquisitors were murdered by heretic groups

¹³ Journet, 223.

¹⁴ Journet, 284.

¹⁵ Journet, 285.

¹⁶ Frederick II, influenced by a revival of Roman law, instituted the death penalty first for Lombardy in 1224, then Sicily in 1231, then for the Empire as a whole in 1232. Gregory IX’s constitution *Excommunicamus* incorporated this penalty into canon law in 1231. Journet, 285; Megivern, 110.

during this time; Thomas certainly would have known of the most famous of these, his fellow countryman and fellow Dominican Peter of Verona (d. 1252).

Whether their reasons were primarily doctrinal or political, some heretics were a civil threat, and no doubt, many were not. If we apply to heresy the rule that CP should be used only when nothing else can be done for the common good, it will be apparent that not all heretics ought to be executed, but only those who but only those who were violent or instigators of violence. CP is a civil penalty, and its aim is a civil one: to protect the basic order without which no human society can exist. Because the authority that held mediaeval society together was an authority sanctioned and guided (at least in theory) by the Christian Church, those who rejected the Church's authority on doctrine often rejected the civil authority as well. This civil threat is what CP was supposed to address.

A regime like that under which Thomas lived is no longer possible or desirable. The question of using the death penalty for crimes of heresy was a specific application to the thirteenth century civil order. Laws determining such penalties were of human making, with the authority only of human reason. Human law, as we saw above, is mutable by nature, and this is good. In speculative matters, "... it seems natural to human reason to advance gradually from the imperfect to the perfect."¹⁷

So also in practical matters: for those who first endeavored to discover something useful for the human community, not being able by themselves to take everything into consideration, set up certain institutions which were deficient in many ways; and these were changed by subsequent lawgivers who made institutions that might prove less frequently deficient in respect of the common weal.¹⁸

¹⁷ *S.T. I-II*, q. 97, a. 1.

¹⁸ *S.T. I-II*, q. 97, a. 1.

The fact that, after much difficulty, human reason arrived at something better, does not mean that the former order was simply evil, just imperfect. Thomas's defense of CP for heresy is not a departure from his own reasoning about the limits of human law and the use of CP only in the presence of a serious threat to the political common good. In 13th century Europe, heresy was a serious threat to the political common good, since it "directly endangered the fundamental political constitution of society."¹⁹ Therefore, under Aquinas's theory, it was reasonable to punish heretics with death. On the other hand, this specific application is bound to the nature of mediaeval political order, which has been superseded by another, and better, order.

B Second Objection: Capital Punishment is Not a Useful Punishment

According to Thomas, utility is one of the things we must consider in determining punishments; we must ask whether this particular penalty actually contributes to the common good. This objection may be referred to as the utilitarian objection to CP, and in fact the father of Utilitarianism, Jeremy Bentham, raised just such an objection about CP: "At the same time, this punishment, it is evident, is in an eminent degree *unfrugal*; which forms one among many objections there are against the use of it, in any but very extraordinary cases."²⁰ Contemporary criminologist Roger Hood explains why CP might be called "unfrugal":

A more utilitarian or practical argument is that there is no convincing evidence that the rate of murder (or any other crime threatened with the death penalty) is

¹⁹ Journet, 283. See *S.T. II-II*, q. 11, a. 3.

²⁰ Jeremy Bentham, *The Principles and Morals of Legislation* (New York: Hafner Publishing, 1948), XV.xix.

consistently lower when the death penalty is on the statute book and enforced by executions. When all the circumstances surrounding the way in which capital punishment is used in democratic states and under the rule of law are taken into account, it has not proved to be a more effective deterrent than the alternative sanction of life or long-term imprisonment ... It is therefore a useless burden on the administration of a rational system of criminal justice.²¹

We could frame this objection in Thomistic terms by saying that CP is not useful to the common good because it does not promote good civil order any more than the alternatives. Since Thomas makes utility one of the considerations in determining punishments, this objection presents a genuine challenge. Considering this objection will also provide the opportunity to distinguish Thomas's doctrine of punishment from that of the Utilitarian.

Response to the Second Objection

Bentham's idea of the utility of punishment differs in important ways from Thomas's. For Bentham, utility is the essence of punishment, and indeed of all law:

The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be every thing that tends to subtract from that happiness: in other words, to exclude mischief.

But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.²²

Bentham does not distinguish between the evils of fault and punishment. Both faults and punishments augment evils; and the primary principle of ethics for Bentham is to act so as to increase happiness (benefit, pleasure, good) and decrease unhappiness (mischief,

²¹ "Capital Punishment: A Global Perspective," 331-32. Hood is also the author of *The Death Penalty: a Worldwide Perspective*, published by Oxford University Press (3rd ed., 2002).

²² Bentham, XIII.i-ii.

pain, evil).²³ Therefore punishment is only justified if it promises to prevent more evil than it causes. Moreover, since utility is the form of law for Bentham (that is, a law is a law insofar as it obeys the principle of utility), there is nothing to prevent a law which sanctions punishing the innocent, where this is useful to the happiness of others.

For Thomas, on the other hand, the utility or medicinal quality is a *quality* of punishment, and not its essence. In punishing an offense, Thomas says, “The second point to be considered [after equity] is utility. For punishments are inflicted as medicines, that men being deterred thereby may desist from sin.”²⁴ Like Bentham, Thomas is concerned with preventing evil, but this for him this is secondary, for only the present evil of fault justifies the penalty. Utility is necessary but not sufficient to justify temporal punishments. Punishment is owed to sin, and is essentially concerned with addressing a present evil which has been introduced by an offense:

And because sin is an inordinate act, it is evident that whoever sins, commits an offense against an order: wherefore he is put down, in consequence, by that same order, which repression is punishment.²⁵

[S]in incurs a debt of punishment through disturbing an order. But the effect remains so long as the cause remains. Wherefore so long as the disturbance of the order remains the debt of punishment must needs remain also.²⁶

²³ “By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness ... By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.” Bentham, I.2-3.

²⁴ *S.T.* II-II, q. 99, a. 4.

²⁵ *S.T.* I-II, q. 87, a. 1.

²⁶ *S.T.* I-II, q. 87, a. 3.

The prevention of potential evils may give an additional reason for choosing or forgoing a certain punishment, but this presumes that the punishment is already justified by the actual evil committed. Given that fact of guilt, the utility of the punishment must also be considered. For temporal punishment, according to Thomas, is not justified solely by its retributive object. Retribution establishes the act as punishment, but temporal punishment must be further justified by its medicinal ends.

However, if the utilitarian objection is taken to presuppose guilt, the objection may be granted. If it is a matter of choosing between CP and another punishment, and it seems that CP will be less useful than the alternative to the political common good, then it should be forgone. As illustration of this point, consider the following reply, which Thomas makes in a question on whether spiritual goods should be forgone on account of scandal:

In the infliction of punishment it is not the punishment itself that is the end in view, but its medicinal properties in checking sin; wherefore punishment partakes of the nature of justice, in so far as it checks sin. But if it is evident that the infliction of punishment will result in more numerous and more grievous sins being committed, the infliction of punishment will no longer be a part of justice. It is in this sense that Augustine is speaking, when, to wit, the excommunication of a few threatens to bring about the danger of a schism, for in that case it would be contrary to the truth of justice to pronounce excommunication.²⁷

The punishment of excommunication (being deprived of the sacraments), is an equitable punishment for crimes against sacred things or persons: “the fitting punishment of one guilty of sacrilege, since he has done an injury to a sacred thing, is excommunication, whereby sacred things are withheld from him.”²⁸ Nonetheless, if excommunicating the

²⁷ *S. T. II-II*, q. 43, a. 7, ad 1.

²⁸ *S. T. II-II*, q. 99, a. 4.

offender(s) would produce schism, then it ought to be forgone. This is a question of ecclesiastical punishment rather than civil punishment, but the principle is the same, because both are temporal, human punishments: if the strictly equitable punishment would increase rather than decrease evil, then the equitable punishment ought to be forgone.²⁹

This differs from Bentham's view in that punishment is forgone for the sake of justice, rather than for the sake of happiness (which Bentham equates with pleasure and benefit). Justice is the reason for punishing in the first place. If, however, a punishment might increase sins, "the infliction of punishment will no longer be a part of justice." In such cases, not punishing is serving the end which punishment itself serves. In the passage on excommunication, it is a question of forgoing punishment in a particular instance, not of forgoing a certain type of punishment as a general policy.

The case of forgoing a certain type of punishment is actually easier to make, in that it is not a question of forgoing punishment altogether, but of choosing one punishment over another. If in a certain society, some alternative to CP, such as long-term imprisonment, seems more useful to the common good, then, other things being equal, Thomas's theory would favor using the alternative. His understanding of the person as a part of society, which justifies CP in some cases, also implies that CP should only be used when necessary to preserve the good of the whole, for "[a] member should not be removed for the sake of the bodily health of the whole, unless otherwise nothing

²⁹ Note that whereas for the consistent Utilitarian, the principle also holds in the reverse (if an *inequitable* punishment will decrease evil, it ought to be inflicted), this is not the case in the Thomistic view. Punishment must be *both* useful and equitable; neither is sufficient for just punishment.

can be done to further the good of the whole.”³⁰ Ordinarily, the good of a whole is not served by cutting off its parts. Only when a part is so corrupted that it is more likely to harm the whole than anything else, should it be cut off. The reason that CP, like amputation, is a last resort, is because it is normally for the good of the whole that none of its parts be lost. Such drastic measures are reasonable only if nothing else can be done for the good of the whole. So human justice, in imitation of divine justice, “puts to death those who are dangerous to others, while it allows time for repentance to those who sin without grievously harming others.”³¹ One might even argue that life imprisonment, as a sort of quarantine, achieves the same end of cutting the offender off from the community, while giving him time for repentance as well. Given the existence of such an alternative, the burden seems to lie on those who would retain the punishment, to prove that CP actually is necessary to the common good.

In answer to the objection based on utility, we have seen that questions of the “frugality” of deterrent effect of a punishment are part of the choice of a particular temporal punishment. However, this judgment presumes that punishment is already justified by the presence of guilt. Utility is a necessary but not a sufficient justification for temporal punishment.

C Third Objection: CP is a Necessary Determination of Natural Law

The next objection has to do with the consistency of my interpretation of Thomas on capital punishment, specifically on whether this is a necessary punishment. In his

³⁰ *S.T.* II-II q. 65, a. 1, ad 3.

³¹ *S.T.* II-II q. 64, a. 2, ad 2.

article “*Evangelium Vitae*, St. Thomas Aquinas, and the Death Penalty,” Stephen Long suggests that CP is a determination that follows so closely from the natural law concerning punishment that it is necessary for achieving proportional equality. He implies that the death penalty has the force of natural law, and not merely of human law, and therefore that the only equitable punishment for some crimes is death. A rightly ordered society would have to punish the most grievous crimes with death. According to Long, this is not an objection to Thomas’s teaching on CP, but the authentic interpretation of this teaching.

Long reads St. Thomas as not only saying that CP is licit, but that it is essential to a just social order (presuming the presence of serious crimes such as murder). He has two arguments for this conclusion, which I will consider separately. First, Long considers the determination of punishments from the natural law. He comments:

On first glance this seems to suggest that only the general need for punishments, but no particular punishment, is derived from natural law. So construed the death penalty (or any penalty) may appear wholly a matter of convention. Yet that something is a determination of the natural law does not cause it to cease to participate the natural law ... Nor is it reasonable to suggest that ‘any punishment will do.’ One can scarcely take solace in supposing that since particular punishments have no force but that of human law, therefore any punishment whatsoever can be levied.³²

It is not true that because punishments are determinations of natural law, they are arbitrary; rather, Long says, they must conform to proportional equality.³³

To read Thomas as saying that all particular punishments are arbitrary is to misread him. Rather, he is making the point that determinations of punishment

³² Long, 527. See *S.T.* I-II, q. 95, a. 2.

³³ Long, 527-28. See *S.C.G.* III, c. 142.

partake of the force of natural law only by partaking generically of the form of lawful punishments.³⁴

Long implies that for Thomas either specific punishments are arbitrary, or they share in the force of natural law. But Thomas does not think particular punishments are arbitrary. Therefore he must hold that particular punishments “partake of the force of natural law.” They partake of this force only generically, which distinguishes them from precepts derived by way of conclusion from the natural law.

Long goes on to say that determinations of natural law are not all “equally remote from the form they particularize.”³⁵ That is, some determinations follow more closely from natural law than others. In support of this claim, Long refers to the analogy Thomas uses to describe determinations of the natural law, the analogy of the craftsman.³⁶ A craftsman applies a form to a particular matter, just as the judge applies the form of punishment to a particular crime. In each case, the form provides only general requisites: to build a two-story house, or to punish a murderer. But the matter itself may impose a kind of necessity: “For instance, if one is building a multilevel house with a given material, and the material can bear only so much stress, then no more than this given amount can be placed upon beams made of that material. Ergo the particular form achieved will be characterized by this necessity.”³⁷ Long continues:

What I am here suggesting is that the relation of the *determinatio* of just punishment to the natural law bears a necessity analogous to the necessity exhibited by proper accidents in relation to essence.... Thus determinations of the natural law may at times flow necessarily from the combination of a general form with some particular matter ... Hence we may say that the form of justice—which

³⁴ Long, 527.

³⁵ Long, 529.

³⁶ *S.T.* I-II, q. 95, a. 2.

³⁷ Long, 529.

is of the natural law—may generate, in relation to particular grave matter, some degree of necessity in the particular form of justice that is dispensed by way of penalty. In other words, the general prerequisites of justice may be most fittingly particularized in relation to a given matter by a certain type of penalty.³⁸

While the proper accident is not contained in the essence to which it belongs, it is “necessarily generated” by that essence. Similarly, Long argues, “the determination is not simply contained in the natural law ... Yet ... it is necessarily generated by its principle cause,” though “only in conjunction with some particular matter.”³⁹ When the precept of natural law, “punishment is due to sin,” comes into contact with a particular sin of murder, the need for a the punishment of death is necessarily generated. If Long’s analysis of determinations of natural law is correct, the death penalty is a determination that follows so closely from the natural law concerning punishment, that proportional equality cannot be achieved without its use.

Long’s second argument for the necessity of CP in Thomas is based on the role of punishment in protecting the common good (what I have called punishment’s utility). In q. 64, a. 2, Thomas defends the use of CP, as we have seen:

Now every part is directed to the whole, as imperfect to perfect, wherefore every part is naturally for the sake of the whole. For this reason we observe that if the health of the whole body demands the excision of a member, through its being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away. Now every individual person is compared to the whole community, as part to whole. Therefore if a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since *a little leaven corrupteth the whole lump* (1 Cor. 5:6).⁴⁰

Long comments on this passage:

³⁸ Long, 529-530.

³⁹ Long, 530.

⁴⁰ S.T. II-II, q. 64, a. 2.

Note that Thomas does not limit the reason for putting criminals to death to their immediate physical danger to others; rather, he clearly speaks of the *nature* of the criminal. Hence, the illustration is of a member that demands excision because it is ‘decayed or infectious’—that is, severe enough corruption (‘decay’) is in its own right harmful to society, apart from any issue of ‘clear and present danger’ in the physical order.⁴¹

Long acknowledges that for Thomas the corruption must be severe in order to justify CP: not just any crime should be punished with death. Yet he does not think read Thomas as saying that the only proper recipient of the penalty is one who presents an immediate physical threat to the community. Thomas himself specifies who may be executed in his Reply to Objection 2 of the same question: human justice, in imitation of divine justice, “puts to death those who are dangerous (*perniciosus*) to others, while it allows time for repentance to those who sin without grievously harming others.”⁴² Long comments:

Note that the “grievous harm” pertains to conduct: that is, if someone grievously harms another, he deserves to be put to death precisely in imitation of the divine justice (as opposed to the sentence of those ‘who sin without grievously harming others’). Again, although such justice “puts to death those who are dangerous to others this dangerousness is a function of evil rather than a mere technical matter of social quarantine. These words are akin to the manner in which one might describe someone as a “dangerous man” even though he were immobilized or imprisoned, because of his vicious character and traits.”⁴³

In other words, Long says, some criminals by their very existence present a serious threat to the common good. The harm they threaten is a spiritual harm, and punishment has a spiritual force that counteracts this harm: the “manifestation and vindication of a divine norm of justice.”⁴⁴

⁴¹ Long, 532.

⁴² *S.T.* II-II, q. 64, a. 2, ad 2.

⁴³ Long, 532-33.

⁴⁴ Long, 521.

Response to the Third Objection

Long uses Thomas's analogy of the craftsman to explain the idea of determination of a form to a particular matter. Rather than explicitly applying this analogy to punishments, however, Long somewhat abruptly switches to the analogy of proper accidents and substance, which Thomas does not use in this context. This is significant, because the craftsman analogy and the proper accidents analogy convey two different ideas of how determinations are derived from the natural law.

Thomas compares the first mode of derivation from the natural law to the way conclusions are demonstrated from principles in the sciences. The second mode, he says, "is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape."⁴⁵ So, for example, if a builder wants to make a two-story house, he knows that the first story will not be able to hold more than a certain weight. On the other hand, he knows that if the second story is too light, it will be insufficient for warmth, easily damaged by storms, etc. So he determines that the total weight of the second story cannot be more than Y or less than X. But within those limits, there is more than one way for the craftsman to achieve his end. His decision will be guided, but not necessitated, by the cost and availability of materials, the desired style, and other factors.

Artistic knowledge is not arbitrary because the artist applies his knowledge of general forms to a specific task. If it were arbitrary, it would not be knowledge. Yet artistic knowledge is not necessary knowledge, because it deals with singulars. The artist

⁴⁵ *S.T.* I-II, q. 95, a. 2.

does not apply a universal law to a particular case, as the mathematician does; rather he determines a general law to a particular matter. The number of singulars is infinite and so, therefore, is the number of products which the artist theoretically could make. But from experience, he knows what happens in most cases, and this knowledge allows him to determine the general form to the particular matter. Similarly, in the case of ethical knowledge (prudence), which is also about actions, the one who has experience of the right kind can determine the general form to particular matter.⁴⁶ The point of the comparison is that the second mode of derivation is more like the knowledge of the artisan than the knowledge of the scientist. It particularizes a law with regard to singulars. Its judgment is neither arbitrary nor necessary; it is an exercise of prudence. For Thomas, the fact that specific punishments follow established conventions is no obstacle to prudence. For he understands convention or custom as the manifestation of reason in deed.⁴⁷ Conventional punishments then should be a help to prudence, because they are the product of collective reasoning about various determinations of the natural law.

Let us apply the craftsman analogy to an instance of determining punishment. Take the judge who has to sentence a man convicted of stealing sheep. In determining a sentence, he is guided by the general form (that crimes should be punished proportionately) and the particular matter (the crime). We can see that the punishment could be too great (death) or too small (a verbal reprimand). But between the extremes, there may be a range of punishments which the judge could validly use, from which he

⁴⁶ See *S.T.* II-II, q. 47, a 3.

⁴⁷ *S.T.* I-II, q. 97, a. 3. Cf. Long, 529, cited above.

can choose in order to fit the circumstances.⁴⁸ His choice within that range, even though it is not determined by necessity, is not arbitrary: it will be determined by legal precedents for similar cases (i.e., by custom), and by various circumstances (the age and situation of the offender, whether the crime was premeditated, etc.)

While the craftsman analogy produces the idea of limits between which a valid punishment may be found, the proper accident analogy produces the idea of a particular punishment following *necessarily* from a particular crime. Long does not claim that the proper accident analogy is implied by any text of Aquinas, but says that “it is consistent for St. Thomas to have thought that certain *determinationes* of penalty are naturally most befitting or even required.”⁴⁹ But in fact, it is *not* consistent for St. Thomas to have thought that certain determinations of penalty are required by natural law.⁵⁰

Long wants to say that specific punishments may be required (i.e., necessary), even though they do not have the force of natural law. But it is just in this requirement or necessity that the force of natural law consists. Thomas says explicitly that things derived from the natural law as conclusions from premises “have some force from the natural law,” but that things derived from the natural law by way of determination “have no other

⁴⁸ In an important way, the judge is unlike the craftsman, presuming that he is bound to apply a certain written law that dictates which punishment is to be given for each kind of crime. Even within those strictures, however, there is usually some flexibility. In the case of the Mosaic Law, where the penalties for specific crimes (including sheep-theft) were divinely given, divine authority would also be necessary to change the penalty. But where specific punishments have only human authority, they may be changed by human authority.

⁴⁹ Long, 530, note 17.

⁵⁰ One recent analysis of Thomas concludes: “Whereas the basis of the need for punishment itself is a direct conclusion from natural law precepts, the decision to inflict *this* or *that* punishment is a *determinatio*, having force only once it is established by human authority.” Koritansky, “The Question of Punishment and the Contemporary Relevance of Thomas Aquinas,” 154.

force than that of human law.”⁵¹ Long affirms this when he says that punishments partake of the force of nature only generically. In other words, *specific* punishments do not carry the force of natural law. But if something is required by natural law, it has the force of natural law. Specific punishments are determinations of natural law, and so do not have the force of natural law. Therefore, specific punishments are not required by natural law.

Even if capital punishment is not in theory required by natural law, it could be that it is always useful to the common good that certain kinds of criminals be punished with death. Long suggests this when he argues that the danger that some criminals present to society is not primarily the danger that they will *do*, or encourage others to do, but in their continued existence as a member of community. Under such a view, law ought to punish not only bad acts, but bad habits. Furthermore, if the convicted murderer is a danger to the community, not so much because of anything he can do, but because of what he is, then the man filled with murderous thoughts is equally dangerous to the community, and “unworthy of continued existence,”⁵² even if he never kills. The only reason for not punishing the latter is the practical impossibility of identifying him; the threat he poses is just as deadly to the common good.

However, there is no evidence that Thomas means by safeguarding the common good anything but protecting others from immediate physical danger. He does not say that the common good is destroyed by the mere existence of evil men, as it would be if virtue itself were the common good. If the common good is equated with virtue, then vice itself corrupts the common good. For Thomas, however, the common good is oriented to

⁵¹ *S.T.* I-II, q. 95, a. 2.

⁵² See Long, 540.

the virtue and happiness of the members of the community, but virtue and happiness are individual goods and not common goods. Therefore, the common good, which is what the death penalty is ordained to protect, cannot be equated with virtue.

In the few cases where Thomas specifies the content of the political common good, he does so in terms such as “freedom from external disorders” and “justice and peace.”⁵³ In other words, he *does* equate the common good with public order, or the external peace of the community, contra Long. Thomas’s words indicate that it is “on account of some sin”—in other words because of the offense—that the evildoer is “dangerous and infectious to the community.” If the dangerousness of the criminal was equivalent to his evilness, then Thomas’s distinction becomes meaningless. For he wants to give time for repentance to those who are not dangerous, but they would not need repentance if they were not evil. Therefore, some who do evil are dangerous to others and some are not. The danger is not a function of evil, as Long maintains, but of evil that tends to inflict harm on others:

All who sin mortally are deserving of eternal death, as regards future retribution, which is in accordance with the truth of the divine judgment. But the punishments of this life are more of a medicinal character; wherefore the punishment of death is inflicted on those sins alone which conduce to the grave undoing of others.⁵⁴

Thomas’s view of the common good does not lead to the conclusion that the mere existence of the evildoer is what threatens the community. If the evildoer’s existence is a threat, it is *because* of the harm which he can still do while he lives. This is the more likely way to read Thomas’s comments, rather than envisioning a situation in which an

⁵³ *S.C.G.* III, c. 37, n. 7; *S.T.* I-II, q. 96, a. 3.

⁵⁴ *S. T.* II-II, q. 108, a. 3, ad 2.

evildoer presented no threat of actual harm. Of course, evil habits tend to produce evil acts, and the members of the community will not be happy if they are full of evil habits, but actions are what harm the common good of peace and justice.⁵⁵

For Thomas, it is only lawful to execute a guilty person “in order to safeguard the common good.”⁵⁶ The good of the community is the decisive thing, the only end that justifies killing a man. In response to the question of killing the innocent, Thomas says:

An individual man may be considered in two ways: first, in himself; secondly, in relation to something else. If we consider a man in himself, it is unlawful to kill any man, since in every man though he be sinful, we ought to love the nature which God has made, and which is destroyed by slaying him. Nevertheless, as stated above, the slaying of a sinner becomes lawful in relation to the common good, which is corrupted by sin. On the other hand the life of righteous men preserves and forwards the common good, since they are the chief part of the community. Therefore it is in no way lawful to slay the innocent.⁵⁷

From this reply it is clear that it is not the nature of the criminal that legitimizes killing him. On the contrary, on behalf of his nature, we ought to preserve and not destroy him. What justifies judicial killing is not hatred of the criminal but love of the common good, which is a greater good than the good of one person, as Thomas frequently affirms.⁵⁸

It has been necessary to reply to this objection in some detail, in order to see its source in a mistaken interpretation of Thomas in two important areas: the mode of deriving specific precepts from natural law by way of determination, and the content of the political common good. Thomas says that things derived from the natural law by way of determination “have no other force than that of human law”; and if something is

⁵⁵ *S.T.* II-II, q. 94, a. 2: “If a man be dangerous and infectious to the community, on account of some sin ...”; *S.T.* II-II, q. 94, a. 6: “the slaying of a sinner becomes lawful in relation to the common good, which is corrupted by sin.”

⁵⁶ *S.T.* II-II, q. 64, a. 2.

⁵⁷ *S.T.* II-II, q. 64, a. 6.

⁵⁸ See, for example, *In I Ethic.*, lect. 2 n. 30; *In I Polit.*, c. 1, n. 21; *S.T.* II-II, q. 26, a. 3 (all cited in c. 3).

required by natural law, it has the force of natural law; so it follows that things derived from the natural law by way of determination are not required by natural law. Regarding Thomas's view of the common good, execution of an evildoer is justified when necessary to the common good, a just and peaceful civil order. An evildoer is a threat to the common good when he is an immediate danger to civil order. Thus, in Thomas's view, the fact of a grave evil does not in itself necessitate capital punishment.

In this section, we have looked at three objections to the consistency of Thomas's account. Some claim that he applies CP too broadly according to his own standards when he justifies it for crimes like heresy. But I have argued that in the Middle Ages, heresy was not only a religious error, but a source of political and social instability. Therefore, if Thomas defends CP for crimes such as murder and treason, it was also reasonable for him to defend it for crimes of heresy.

The second objection was that Thomas is inconsistent in maintaining that punishment must be useful to the common good and at the same time approving CP, which is not useful to the common good. In response, I argued that for Thomas utility is a necessary condition in determining temporal punishment, it is not a sufficient condition. His defining criteria is guilt; that is, punishment is punishment insofar as it is a response to actual guilt (the retributive meaning of punishment). Utility then must be considered: given that punishment is justified, which punishment will be most conducive to the common good? If taken in this sense, then the objection may be granted. If CP is truly less useful to the common good than other serious punishments, then it ought not to be used.

Finally, some say that according to Thomas's theory of punishment, capital punishment has a sort of necessity about it, that when the natural law precept to punish evildoers comes into contact with certain grave evils, the precept to execute necessarily follows. I have argued that Thomas consistently maintains that specific punishments have only the force of human law. Punishments are specific determinations of natural law that are subject to changing conditions of the common good and changing customs. Therefore, it is consistent to maintain that Thomas was correct in his justification of CP and to maintain that CP now ought not to be used.

There is another whole category of consistency objections which I have not addressed here because they are properly theological. Some of these appeared in Thomas's own replies in *S.T.* II-II, q. 64, a. 2. In general, these objections maintain that his account runs contrary to certain revealed truths. I consider these objections in the Appendix.

D Fourth Objection: The Human Person is not a Part

The fourth and fifth objections are based on the rejection of Thomas's view of the political common good. The fourth objection maintains that the human person is not part of society, but only a part can be disposed of for the good of the whole, and therefore the person cannot be disposed of for the good of the whole. Thomas, like Aristotle, applies the logic of whole and part to the person and the political community. In the ancient and mediaeval worlds, this was an uncontroversial move, but many modern thinkers have found this application deeply troubling. Germain Grisez comments,

We might grant that the good of a citizen precisely as citizen is subordinate to the common good of society, but the role of citizen is only one dimension of the one's whole personality, and the whole person cannot be rightly viewed as mere part of the social whole. That is precisely why we reject totalitarianism and maintain that all persons have some fundamental rights that the society may not take away ...

Aquinas surely was aware of this point, but he did not pay sufficient attention to its implications for the argument he proposed in defense of capital punishment ...

Aquinas, in following Aristotle, adopts the analogy between individual persons in relation to the common good and bodily parts in relation to the good of the whole organism. If the analogy held, society would surely be justified in acting to protect the common good by methods that would be immoral if used by individuals to protect themselves. However, if no human society is complete, if civil society is merely one form of community with limited concerns, then it is by no means clear that men associated in states may rightly kill wrongdoers to protect the common good if such killing would be morally forbidden to individuals.⁵⁹

The objection is put more forcefully by the contemporary Spanish Dominican Niceto

Blázquez. James Megivern summarizes Blázquez's position in *The Death Penalty: An*

Historical and Theological Survey:

Blázquez has a number of criticisms of the passages on the death penalty in the *Summa*. In general, Thomas proceeds here more as an Aristotelian philosopher, drawing cold rationalistic conclusions from a notion of natural law, than as a Christian theologian, dealing directly with the pastoral goals of the gospel. Especially in his medical analogy, justifying the killing of malefactors as gangrenous members that threaten the welfare of the whole body, the argument bristles with difficulties of equivocation. *Whole* and *part* do not mean the same thing in a social body as in a physical body. "A person is not related to a society as to his ultimate end as an arm is to the body. So it is not reasonable to deduce that a person can be killed in function of the society to which he belongs, since the specific goal of every human person transcends the community."⁶⁰

Blázquez accuses Thomas of equivocating when he compares the member of society to

the member of a living body. The bodily member has no transcendent goal; it is entirely

⁵⁹ Grisez, "NL Ethic of Killing," 68-69.

⁶⁰ Megivern, 119 (Citing Blázquez, "La Pena de Muerte—Lectura Critica del Pensamiento de Santo Tomás," 125). Megivern does not claim to agree with the entire position of Blázquez, though his general stance is abolitionist.

ordered to the body of which it is a part. The member has no existence without the body, but the body may exist without the member. Thus, it is reasonable to prefer the good of the body to the good of the member and to cut off the part if it will preserve the whole. If the human person were a part of the community in the same way that the bodily member is part of the living body, then perhaps he could be killed for the good of the community. But the human person has a goal transcending the whole political order, as Thomas himself admits. He is not entirely ordered to the political community. Therefore it is not reasonable to kill him for the good of this community.

Response to the Fourth Objection

Grisez and Blázquez are not the only contemporary thinkers who have found Thomas's "medical analogy" to be a stumbling block. This objection is sometimes connected to a reaction against Thomas's comparison of the evildoer to an irrational beast. We saw how Thomas used this comparison in his reply to an objection in q. 64 (see Chapter II.A.2). The evildoer is like a beast in that he is ordered to the political common good by an external principle (as the beast is ordered to human goods by an external principle), instead of ordering himself to that common good. Understood thus, the comparison is not as offensive as at first sight, but it remains an unfortunate one, too easily misunderstood and abused.

There are two things we must consider in response to this objection. First, is Thomas equivocating when he uses the terms whole and part with reference to the political community and to the living body? Second, is the comparison between CP and

amputation an accurate one? Grisez thinks that “if the analogy held, society would surely be justified in acting to protect the common good by methods that would be immoral if used by individuals to protect themselves,” and Blázquez implies the same.⁶¹

Blázquez and Megivern accuse Thomas of equivocating, of using the word “part” as if it meant the same thing when used of a person and a foot. This is not a case of pure equivocation, however, but of analogy. Thomas never claims that whole and part mean the same thing when applied to a social group and to a living body. On the contrary, he distinguishes between different kinds of wholes. He explicitly rejects an “organic” view of society when he explains that the political community, like the family, is a unity of order, and not something absolutely or substantially one.⁶² Yet he also thinks that different wholes have something in common, precisely as wholes; namely, a whole has unity of form. If whole is an analogous term, so is part. The parts are parts in different ways, depending on whether they belong to an accidental or a substantial whole.

Thomas agrees with the assertion that the role of citizen does not complete the human person. Yet the person cannot be divided so that one part of him belongs to the state, one part to the family, etc. Therefore, when we talk about man as citizen, we are not talking about *a part* of man, but the whole man *as part* of the political community. So man—the whole man—is part of the political community, but not in the same way that the hand is part of the human body. The latter is a substantial whole, whose part has no operation apart from that whole. The former is an accidental whole, whose part does have

⁶¹ Grisez, “NL Ethic of Killing,” 68-69.

⁶² *In I Ethic.* lect. 1, n. 5: “It must be known moreover that the whole which the political group or the family constitutes has only a unity of order, for it is not something absolutely one.”

an operation apart from that whole: the operation by which man is directed to his ultimate goal. So it does not follow from the fact that “the role of citizen is only one dimension of the one’s whole personality,” that “the whole person cannot be rightly viewed as mere part of the social whole.”⁶³ This would follow only if “dimension” meant the same as “part.” But the dimension in question—man’s political dimension—is not a part, but a relation. In relation to the political community, man is a part. Thus, Aquinas can maintain that the person is part of the social whole, but not by virtue of everything he is and has, because he is called to an end that infinitely surpasses the entire created order: “Man is not ordained to the body politic, according to all that he is and has.”⁶⁴

Even if we relieve Thomas of the charge of equivocation, and admit that the individual person is part of a political society, does the comparison between CP and amputation work? We should be clear about how Thomas uses the medical analogy. In fact, it would be clearer if we did not refer to this as an analogy. Part and whole are analogous terms; amputation and capital punishment are two applications of the priority of whole to part. If Aquinas were reasoning from part-whole relationship in the human body to the part-whole relationship in human societies, this would be problematic, since they are obviously very different kinds of wholes. Instead, he applies the general speculative principle (the whole is greater than its part) to the political community as a whole. The medical metaphors are supposed to make this clearer by giving us a more immediate, more physical example of the whole-part relationship.

⁶³ Grisez, “NL Ethic of Killing,” 68.

⁶⁴ *S.T.* I-II, q. 21, a. 4, ad 3.

We can speculate about why he chose medicine as a source of metaphors for politics. Clearly, he had Aristotle's example, but there is more to be said for it. Medicine and politics are both arts, requiring the exercise of practical reason. We cannot expect the same sort of certainty in these fields as we would in geometry and logic. Both arts have man as their material, but medicine is concerned with the body, while politics is concerned with the whole man. Medicine seeks the bodily good of man; politics seeks the complete good of man. While the practitioner of either art has rules to guide him, he must also be guided by the particular matter he is working with. These similarities allow Thomas to use examples from medicine to help make his points about politics. The medical examples are better-known, since most men have experienced bodily health and sickness and are in a way experts on their own bodily needs, while fewer have true political knowledge.⁶⁵

The medical analogies, however, are not meant to carry the argument. Thomas points to perceived similarities in order to bring out the principles that lie behind the similarities. In the case of vengeance, he says that the punishments inflicted by society are like medicines, in that they tend to promote the health of the body politic. Vengeance that does not actually serve a good end such as the ones mentioned above is like medicine that does not make the body healthy, or that treats a minor ill at great cost to the body. A good doctor will not prescribe medicine for every ill. If it is a minor complaint, it may be borne equitably and disappear on its own. Or if the cure is so severe that it would

⁶⁵ "Admittedly someone without scientific knowledge may well attend properly to a single person, if his experience has allowed him to take exact note of what happens in a given case, just as some people seem to be their own best doctors, though unable to help anyone else at all.... Then perhaps also someone who wishes to make people better by his attention, many people or few, should try to acquire legislative science, if laws are a means to make us good." *Ethics* X.9.1180b17-20; 24-26.

endanger the life or well-being of the patient, it may be better to live with the illness. In the same way, a just man will not demand vengeance for every wrong, nor will he demand vengeance when it would endanger the good members of society.⁶⁶

Moreover, a doctor will sometimes prescribe a medicine not to cure but to prevent a sickness. Now punishment properly speaking is only inflicted for sin, and this is vengeance. But as there are preventive medicines, so there are medicinal punishments that, though they do not fall under the strict definition of punishment, do inflict some harm for the sake of preventing evil.⁶⁷ Good medicine does not inflict a greater harm to prevent a lesser one (blinding the eye to save the heel), but it may inflict a lesser harm to prevent a greater (removing a benign tumor lest it become cancerous, for example).⁶⁸ In this way, deprivation of lesser things (specifically, in material goods, the lowest category of good) does not require a wrong done or a need for vengeance, insofar as it promotes a greater (spiritual) good. This applies most properly to divine punishment, since God knows what is conducive to the good of each individual.

Abuse of the individual by the state is a valid concern, especially given recent history, but this does not seem to have been a major concern to Thomas or his contemporaries. On the other hand, we might wonder whether his theory lends itself to the kind of distortion that Grisez fears, whether a part too easily becomes a mere part, something insignificant and dispensable. In the mid-twentieth century, Jacques Maritain

⁶⁶ “Our Lord forbids the uprooting of the cockle, when there is fear lest the wheat be uprooted together with it.” *S.T. II-II*, q. 108, a. 3, ad 1.

⁶⁷ See *S.T. II-II*, q. 108, a. 4.

⁶⁸ *Ibid.* The first example is Thomas’s; the second is mine.

attempted to reconcile Thomas's view of the common good with modern sensitivities by distinguishing between *individuality* and *personality*:

In brief, while the person as such is a *totality*, the individual as such is a *part*; while the person, as person or as totality, demands that the common good of temporal society should flow back to him, and while through his ordination to the transcendent whole, he even surpasses the temporal society, the same person, as an individual or as part, is inferior to the social whole, and must serve the common cause as a member of the whole.⁶⁹

In another work, Maritain criticizes totalitarian political philosophies, which take a materialistic view of reality. These theories “seek to incorporate man in all his being into a social whole composed of a multitude of material individualities.”⁷⁰ But Maritain also criticizes theories that deny that man is a part of the political whole:

Yet we must not say that the aim of society is the individual good (or the mere collection of individual goods) of each person who constitutes it! This formula would dissolve society *as such* for the benefit of its parts, and would lead to the ‘anarchy of atoms’....

The end of society is its *common good*, the good of the body politic. But if one fails to grasp the fact that the good of the body politic is a common good of *human persons*—as the social body itself is a whole made up of human persons—this formula may lead in its turn to other errors of the collectivist or totalitarian type. The common good of society is neither a simple collection of private goods, nor a good belonging to a whole which (as in the case of the species in relation to its individual members) draws the parts to itself, as if they were pure means to serve itself alone. The common good is the *good human* life of the multitude, of a multitude of *persons*; it is their communion in the good life; it is therefore common *to the whole and to the parts*, on whom it follows back and who must all benefit from it.⁷¹

Maritain thus attempts to preserve the priority of the political common good, while allaying modern fears of a totalitarian state. The distinction between man as individual

⁶⁹ Maritain, *Scholasticism and Politics*, 76.

⁷⁰ *Person and the Common Good*, 94.

⁷¹ Maritain, *Scholasticism and Politics*, 72.

and man as person, though not one used by Thomas, is one way of explaining how man is part of political society, without reducing him to a “mere part.”

The objection against the description of man as part of the political community does not hold up to sustained analysis. The objection overlooks Thomas’s analogous use of the terms part and whole. He never says that man is a part of the political community in the same way that the hand is part of the human body. Man is part of the political community by belonging to the political order, an order created by reason. The human person (a substantial whole) is part of this community (an accidental whole), but not according to all that he is and has. Man’s final goal surpasses the political order, but does not erase it.

E Fifth Objection: The Political Common Good is a Merely Instrumental Good

The second sort of difficulty that modern thinkers often have with Thomas’s view of the common good is his insistence that the political common good is a true good (*bonum honestum*): neither a collection of individual goods nor simply a means to the good of the individual. Like other pre-modern thinkers, Thomas supposes that the purpose of government is to make men good, to promote happiness through inculcating virtue: “Legislators make men virtuous by habituating them to virtuous works by means of statutes, rewards, and punishment.”⁷²

Modern political thought, on the other hand, tends to see the political common good as an instrumental good. That is, the good that political life seeks is a means to the

⁷² *In II Ethic.*, lect. 1, n. 251.

good of individuals. The role of government is to provide the conditions in which men can pursue their individual good. Since the political good is a means to individual goods, legislators cannot—and should not try—to make men good. Virtue is a matter for individuals to pursue; the state does best by not getting in the way of individuals' pursuit of virtue. Thus, the objection says that political common good is merely an instrumental good, which is directed toward the good of individuals. An instrumental good cannot be a greater good than its end, and so the common good is not greater than the individual good.

Response to the Fifth Objection

In response to the objection that the political common good can be no more than an instrumental good, we must first observe that there are two kinds of “instrumentalist” views of the common good. One kind (I will call it the liberal view) assumes no content to the human good and leaves it entirely to individuals to determine (or create?) the good they will pursue. The only limits are in how the individual will pursue his chosen end: he may not do so in a way that prevents other individuals from pursuing their ends. Public authority remains agnostic about human nature itself, and about what end or ends, if any, are appropriate to man. Some take the liberal instrumentalist view of the common good as the only reasonable approach to the common good. Others see it as a necessary compromise in a pluralistic community. In a community made up of persons with fundamentally diverse views of the human good, there can be no consensus about how to promote this good. The best we can hope for, in this view, is that the government of such

a society will remove barriers to individuals or group pursuit of their goods (or prevent them from arising). This is achieved through entering into a contract or agreement, in which each member agrees to restrict his own activities in pursuit of his private good, in order to guarantee that others will likewise restrict their activities, so that one person's pursuit of his good will not impinge on others' pursuit of their goods.

The second kind of instrumentalism (I will call it the ontological view) presupposes that there *is* a common human nature and that this nature is fulfilled only in certain ways. Representative of this view is the twentieth century Thomist I. Th. Eschmann: "The common good has a relative and limited pre-eminence *in via utilitatis*, because it is essentially a *bonum utile*, the highest *bonum utile*, but nothing more."⁷³ This is also the view that seems to be affirmed in *Gaudium et spes* (n. 26), the Vatican II Constitution on the Church in the Modern World, which describes the common good as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment."

The role of the political order, in this view, is to produce *conditions* in which the end, human fulfillment, can be achieved. These conditions may include both the creation of opportunities by things like roads and systems for transporting water and energy, as well as constraints on behavior through force. Not only are some ends ruled out in this view, but some means are also ruled out as incompatible with the end. In this view, good government presupposes some knowledge (not perfect knowledge) of human nature and

⁷³ Eschmann, "In Defense of Maritain," 160.

the human good. A partial view of the human good is sufficient to foster the conditions in which that good can be achieved.

The liberal instrumentalist view is fundamentally at odds with Aquinas's view of human action. For Aquinas, human activity (all activity, in fact) presupposes an end. And common activity seems to presuppose a common end. If, as Aquinas says, human activity is specified by its object, which is the end willed as the reason for willing the means. Common human activity—if we mean more than just the fact that two agents happen to be doing the same thing—requires a common end. A common end is a common cause of action. That is, the agents share the same end, which provides the reason for willing the means. From this perspective, it is difficult to make sense of the idea of a group of individuals united in a common activity, which has no one end, where each individual acts for his own end.

In fact, the idea of an ends-neutral view of the common good is inconsistent. The liberal instrumentalist view claims not to rely on any determinate end of man, yet it rules out the pursuit of ends that cannot be achieved without such means as murder, theft, and slavery (for instance, the goal of becoming a dictator). If the exclusion of these ends is not simply arbitrary, it must be that even the liberal view presupposes something about human well-being: for instance, that it includes bodily integrity, the ability to communicate freely with others, some amount of self-determination in choice of work, spouse, residence, etc. Put another way, without some knowledge of what the human good is (or at least some knowledge of what it is not), one cannot determine what

conditions will allow men to pursue their individual goods. Conditions necessarily limit possibilities, and they limit them in view of some end.

The ontological instrumentalist view, on the other hand, rules out some ends and means on the basis of a limited knowledge of the human good. This view does not claim to be neutral about the human good. Yet it differs from Thomas's view in its rejection of the claim that the aim of politics is to make men good. The aim is rather to create the conditions in which men can become good. Yet when we look at what Thomas means by making men good, the distinction between these views begins to collapse.

When Thomas says, "legislators make men virtuous,"⁷⁴ he does not mean that the legislator is the efficient cause of virtue in those subject to the law. Virtue is an internal disposition in the agent, from which virtuous acts proceed. Rather, "Legislators make men virtuous by habituating them to virtuous works by means of statutes, rewards, and punishments. Such ought to be the aim of every legislator—in fact he who does not succeed in this fails in lawmaking."⁷⁵ The legislator can exhort men to virtue, and he can use force to induce them to perform certain acts in accord with virtue. By repeating such acts, the legislator hopes that subjects will become accustomed to doing what is noble and avoiding what is base. Virtue arises from the repetition of voluntary, virtuous acts; when virtuous acts do become habitual and pleasant, moral virtue has been achieved.

Good laws, then, provide the occasion for virtuous acts; they make it easier for men to become good, by making virtue appealing and vice repulsive. They support and add to paternal force, as Aristotle says. To make virtue easier is to make it easier for men

⁷⁴ *In II Ethic.*, lect. 1, n. 251.

⁷⁵ *In II Ethic.*, lect. 1, n. 251.

to achieve their good. But this is just to create the conditions in which men can achieve their good, which is what the ontological instrumentalist view maintains. There may be significant differences between the pre-modern view and the instrumentalist view about what those conditions are, but both views seem to aim at “making men good” by producing conditions in which men can attain virtue. A good community is one that makes its citizens good, where “makes” is understood as makes the conditions in which they can more easily become good, especially good in their relationships with others (i.e., just). A good community would make it easier for parents to nourish and educate their children, by offering sufficient wages and reasonable working hours. It would make it easier for spouses to be faithful to their marriage, by the regulation of pornography, prostitution, and divorce (perhaps even contraceptives). It would make it easier for all to seek the truth by supporting the work of universities and libraries, and easier to worship God by allowing laborers time off on holy days. None of these efforts will guarantee virtue, but only make it more possible.

For Thomas, virtue itself cannot properly be the end of law. The end of law is the common good. Virtue is a good common in predication only, and not common in causation (see Chapter III). The political common good is a good common in causation; otherwise, it would make no sense to say that anyone seeks it. This good is not virtue itself, but the just and peaceful civil order, which is necessary for the formation and exercise of virtue. Legislators and rulers aim at virtue, in that they aim at one of the necessary conditions for virtue (they also need to possess virtue, in order to create the conditions for its growth).

One of the most obvious ways that civil law fosters virtue is by punishing vice. Human law should not repress every vice, Thomas tells us, “but only the more grievous vices ... and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.”⁷⁶ Nor should human law prescribe every act of virtue, “but only in regard to those that are ordainable to the common good ... whereby the citizens are directed in the upholding of the common good of justice and peace.”⁷⁷ Thus, government can only make men good in an indirect way, by creating the conditions of justice and peace. Virtue is more easily acquired in a society that is well-ordered and not at war with its neighbors. So it seems that for Thomas, the common good is in fact an instrumental good. Yet Thomas also maintains that the part is for the sake of the whole. If the common good is an instrumental good, how can it be greater than, prior to, even more “divine” than the individual’s good, which is undoubtedly a true good?⁷⁸

The answer is that the common good is both a true good and an instrumental good in Thomas’s view. Civil order is a true good, but it is also means to other goods, moral virtue and human happiness. The objection was that since the political common good is merely an instrumental good, it cannot be greater than the good at which it aims, which is the individual good. The common good is a true good, Thomas maintains, and as such it surpasses individual goods in the same genus: “The common good takes precedence of the private good, if it be of the same genus: but it may be that the private good is better

⁷⁶ *S.T. I-II*, q. 96, a. 2.

⁷⁷ *S.T. I-II*, q. 96, a. 3.

⁷⁸ “But the good of the multitude is greater and more divine than the good of one man.” *De Regno* I.9.

generically.”⁷⁹ The good that political society seeks is a temporal good—the highest temporal good, which takes precedence over the temporal goods of individuals.

Considered as a means to virtue and happiness in individual, however, the political common good is an instrumental good. It is a means to a good of a different order, another genus altogether. For we cannot forget that the good of human happiness, for Thomas, is an eternal, divine good.

In summary, both kinds of objections to Thomas’s view of the common good are based on misrepresentations of that view. The whole-part objection attributes an “organicist” view of the state to Thomas, which he does not hold. It ignores his distinction between substantial and accidental wholes. Individual persons are part of that whole, Thomas says, but they also have an eternal destiny that surpasses the political common good. The second objection fails to understand the role of government in fostering virtue in Aquinas’s view. For him, there is no contradiction between maintaining that the political common good is a true good and maintaining that it is a means to individual human happiness.

F Sixth Objection: Intentional Killing Is Always Evil

In articulating this last and most far-reaching objection to Aquinas’s account, I draw on the work of Germain Grisez (sometimes joined by Russell Shaw or Joseph Boyle) and John Finnis. The main argument can be stated briefly. To kill a person intentionally is always to do evil. To execute a person is to kill a person intentionally.

⁷⁹ S.T. II-II q. 152, a. 4, ad. 3.

Therefore to execute a person is to do evil. Since one must never do evil, even for the sake of a good end, CP is ruled out.

Finnis and Grisez begin from a generally Thomistic starting point. Finnis, for example, describes his relationship to Aquinas's thought, saying that his own work in moral theory "has employed principles which seemed to me to be substantially those employed by Aquinas ..."⁸⁰ But the "new natural law theory" of Finnis and Grisez differs in important ways from Aquinas, as Stephen Long comments:

John Finnis—alongside his collaborator, and, in certain respects, doctrinal progenitor Germain Grisez—is known for propounding a philosophic account of the natural law. Hitherto his view have developed only in loose relation to the teaching of St. Thomas Aquinas. As Finnis notes, since 1965, "Grisez's major writings have not claimed to be interpretations of Aquinas" so that St. Thomas's work has served merely as "the point of departure for a freestanding philosophical treatment of ethical theory" upon which Grisez and Finnis have "collaborated extensively."

Finnis's latest work—*Aquinas: Moral, Political, and Legal Theory*—marks a departure from this "freestanding" theoretic work, and offers an interpretation of St. Thomas's natural law doctrine congenial to the new natural law theory.⁸¹

Grisez and Finnis acknowledge that their work differs in important ways from that of Thomas Aquinas. For instance, in the book mentioned by Long (1998), Finnis says,

There are some serious flaws in Aquinas' thoughts about human society. A sound critique of them can rest on premisses he himself understood and articulated better, I think, than his philosophical masters Plato and Aristotle, and much better than Machiavelli, Hobbes, and the other makers of heirs of the Enlightenment.⁸²

⁸⁰ Finnis, *Aquinas: Moral, Political, and Legal Theory*, viii.

⁸¹ Long, "St. Thomas Aquinas Through the Analytic Looking-Glass," 259. For additional critique of the "new natural law theory," see Long's "A Brief Disquisition Regarding the Nature of the Object of the Moral Act According to St. Thomas Aquinas," and Russell Hittinger, *A Critique of the New Natural Law Theory*.

⁸² Finnis, *Aquinas*, vii.

The defense of capital punishment is one of the flaws that Finnis sees in Aquinas's teaching on human society. His comments and those of Grisez form an important objection to Aquinas's account.

Grisez first articulates the objection we are considering in his 1970 article "Toward a Consistent Natural-Law Ethics of Killing," where he argues that no one, whether a public authority or a private person, may lawfully intend the death of another person, for whatever reason.

As for capital punishment, I think Thomas was right in holding that such killing is intentional. The good effects, if any, are in other acts. Since I do not accept the justifiability of intentional killing, I do not see how capital punishment can be justified.⁸³

This essay contains Grisez's most thorough critique of Aquinas's doctrine of CP, as a preliminary to the statement of his own position, which is that CP, since it is intentional killing, cannot be justified.⁸⁴ Grisez reaffirms this position in some of his later writings:

Capital punishment under modern circumstances clearly executes a proposal to kill someone as a means of punishment. However punishment is conceived—whether as a restoration of the balance of justice or as deterrent—the death penalty cannot be carried out without killing in the strict sense. Hence this form of punishment is immoral. (1979)⁸⁵

Analysis of the action of capital punishment can only lead to the conclusion that a life is being taken precisely as a means to a remote good end: the deterrence of crime. (The same thing would apply to the argument that a particular person must be executed in order to prevent *him* from committing additional crimes in the future.) Since this is so, one must conclude that there is no ethical justification for capital punishment. (1980)⁸⁶

⁸³ Germain Grisez, "Toward a Consistent Natural-Law Ethics of Killing," 91.

⁸⁴ Grisez has maintained consistently the "no intentional killing" thesis since 1970. Gerard V. Bradley, "No Intentional Killing Whatsoever: The Case of Capital Punishment," in *Natural Law and Moral Inquiry: Ethics, Metaphysics, and Politics in the Work of Germain Grisez*, 155-173.

⁸⁵ Germain Grisez and Joseph M Boyle, *Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate*, 400.

⁸⁶ Germain Grisez and Russell Shaw, *Beyond the New Morality: The Responsibilities of Freedom*, 155.

Finnis also argues that CP involves the intent to kill, giving a more detailed treatment of Aquinas's argument:

To impose a sentence of capital punishment is, as Aquinas plainly says, to intend the death of the person executed. But sometimes he seems to be saying that a judge can impose a sentence of capital punishment without intending the convict's death either as means or as end in any standard sense of 'means', 'end', or 'intend'. Moreover, Aquinas' general theory of punishment ([Finnis, *Aquinas*, section] VI.5) gives some support to this notion. To impose a penalty as a means of reforming or deterring the offender, or deterring potential offenders, or educating or encouraging the community, is necessarily to choose the restriction, pain, or loss (e.g. of life or limb) *as a means* to the desired end(s), i.e. *as a* proximate object within the whole proposal intended and adopted in choosing and executing the penalty. But when punishment is imposed precisely as retribution ... it can seem plausible to say that what for the offender is a bad (the restriction, pain, or loss) is chosen by judge and executioner *as a good*—and not as a means to further good....

In punishment precisely as retribution, the restriction, pain, or other loss is chosen as the suppression of the offender's will (which was indulged in the offense), and that suppression is not a mere means to some future good but rather is itself a good: the restoring of the order of justice disturbed in the offense. The choice to impose punishment is, then, 'referred to' the common good of justice, and as such is the choice of a good (and not of a bad as a means to that good).⁸⁷

In an earlier section, Finnis explains that for Thomas, "it is of the essence of punishments that they subject offenders to something *contrary to their wills* {contra voluntatum}."⁸⁸

The offender is guilty of following his own will to excess, and therefore, in causing him to suffer something contrary to his will, "the order of just equality in relation to the offender is restored."⁸⁹ Therefore, in Thomas's view, what the offender suffers is not a *means* to retribution, but itself *constitutes* the good of retribution. On the other hand, Thomas seems to deny that the end in punishing is the suffering of the offender. This

⁸⁷ Finnis, *Aquinas*, 279.

⁸⁸ Finnis, *Aquinas*, 212.

⁸⁹ Finnis, *Aquinas*, 213.

leads Finnis to say that Thomas “seems to be saying that a judge can impose a sentence of capital punishment without intending the convict’s death either as means or as end in any standard sense of ‘means’, ‘end’, or ‘intend’.”⁹⁰ Yet Finnis nonetheless concludes:

But at the end of the day, Aquinas himself rejects their [his arguments’] conclusion that imposing and carrying out capital punishment involves no intent to kill. At the very moment when he is most keenly focusing on the distinction between what is and is not included within intention in relation to actions foreseen to have a lethal outcome, he accepts that the executioner is ‘intending to kill {intendens hominem occidere}’[*S.T.* II-II, q. 64, a. 7] ... [And] the question remains. Why is it justified to choose and intend to inflict death or other irreparable harm to the basic good of life and health, by way of punishment?⁹¹

Grisez and Finnis’s objection rests on two premises: first, that all intentional killing is (morally) evil; second, that one may not do evil to achieve a good end. The first premise rests on the notion that there are certain absolute (exceptionless) moral norms.⁹² The exceptionless moral norms are negative norms that prohibit action against any of the basic human goods, such as human life, knowledge, of sociability. Under this theory, any “choice to destroy, damage, or impede” one of these basic human goods is an evil choice, a wrong.⁹³ Killing destroys the good of human life. Therefore, the prohibition of killing is an exceptionless moral norm. This prohibition applies to intentional killing, say Finnis and Grisez, and CP is best described as intentional killing.⁹⁴ Aquinas fails, Finnis argues, “to reply convincingly to the argument that capital punishment, since it involves the

⁹⁰ Finnis, *Aquinas*, 279.

⁹¹ Finnis, *Aquinas*, 280, 281-282.

⁹² Finnis, *Moral Absolutes: Tradition, Revision, and Truth*, Chapter 1.

⁹³ Finnis, *Moral Absolutes*, 80. Grisez and Shaw use the same terms (“destroy, damage, or impede”) in *Fulfillment in Christ*, 93.

⁹⁴ In some of his earlier works, Finnis is open to the possibility that CP might not count as *intentional* killing. That is, in the act of punishing a man with death, there could be two effects, one intended (justice) and the other beside the intention (killing). He later rejects this possibility. Finnis, *Aquinas*, 282.

intent to kill as a means, is ‘doing evil that good may come,’ i.e. the pursuit of a good end (the restoration of the order of justice) by inherently immoral means.”⁹⁵

The second premise, that one may not do evil to achieve a good end, is articulated in Grisez’s eighth “mode of responsibility” and in Finnis’s seventh “requirement of practical reasonableness.” Finnis’s seventh requirement of practical reasonableness is that “it is always unreasonable to choose directly against any basic value, whether in oneself or in one’s fellow human beings.”⁹⁶ Similarly, Grisez’s eighth mode of responsibility “entirely rules out choices to kill”⁹⁷:

*One should not be moved by a stronger desire for one instance of an intelligible good to act for it by choosing to destroy, damage, or impede some other instance of an intelligible good, whether that same one or another. This mode comes into play when one is tempted to do evil for the sake of good, adopt bad means to a good end.*⁹⁸

In essence, Finnis and Grisez charge Aquinas with an internal inconsistency, since he maintains that one may not do evil that good may come, and yet he justifies doing evil (killing) in the case of CP.⁹⁹

Response to the Sixth Objection

Finnis points out a puzzle in Aquinas’s thinking on CP: he says that the evil of punishment (in the case of CP, the death of the offender) is not the *end* that the one

⁹⁵ Finnis, *Aquinas*, 282.

⁹⁶ Finnis, *Natural Law and Natural Rights*, 225.

⁹⁷ The modes of responsibility are principles that lie between the first principle of morality (“one should always will in accord with a will toward human fulfillment”) and specific moral norms (e.g., never kill an innocent person). Germain Grisez and Russell Shaw, *Fulfillment in Christ: A Summary of Christian Moral Principles*, 86.

⁹⁸ Grisez and Shaw, *Fulfillment in Christ*, 93.

⁹⁹ “Finnis holds that Aquinas is guilty of unwittingly approving the ‘doing of evil that good may come.’” Long, “Aquinas Through the Analytic Looking-Glass,” 260.

punishing has in view.¹⁰⁰ Nor is the death of the offender a *means* to some other end, if we are considering the punishment simply in its character of punishment. Yet it seems that if something is included neither in the end nor in the means, then it is not intended. But it seems absurd to say that in an execution, death is not intended. Therefore, Thomas seems to be saying that in CP, death is both intended and not intended.

To resolve this puzzle, it will be helpful to review some distinctions articulated in Chapter II, in particular the distinctions between intention and volition, and between object and end. An end is that which is willed for its own sake. Willing in the strict sense, or volition, is an interior act of the will, whose term is the end. This movement of the will is toward the end simply, without regard to the means necessary to achieve that end.¹⁰¹ Intention, on the other hand, is the act by which one wills the end as a reason for willing the means.¹⁰² The term of the act of intention is the object, which is distinguished from the end simply, in that it is the end-as-reason-for-willing-the-means.¹⁰³

Thomas, Finnis, and Grisez all affirm the premise that one may not do evil that good may come. They differ over the premise that all intentional killing is evil. Grisez and Finnis believe that this premise follows logically from Aquinas's understanding of human acts. That is, death is an evil. One who wills evil has a bad will (moral badness). CP is willing the evil of death. Therefore, the one who punishes with death has a bad will. I argued in Chapter II that Thomas's theory of human acts clearly distinguishes between the moral species of different kinds of killing. Precisely because of his understanding of

¹⁰⁰ S.T. II-II, q. 43, a. 7, ad 1.

¹⁰¹ S.T. I-II, q. 8, a. 2.

¹⁰² S.T. I-II, q. 12, a. 4.

¹⁰³ S.T. I-II, q. 12, a. 1, ad 4.

what specifies human acts, Thomas is able to argue that killing as punishment is a specifically different moral act than murder.

To the person who suffers any evil, the destroying, damaging, or impeding of a good is an evil of punishment.¹⁰⁴ Punishment is an evil, for the loss of a good is an evil for the one who suffers the loss.¹⁰⁵ Fault, which is a lack in the operation of the will, is evil simply.¹⁰⁶ The death penalty of course deprives the offender of the good of bodily life. Therefore, it should come as no surprise that Aquinas admits that CP is intentional killing,¹⁰⁷ just as imprisonment is intentional confinement. CP is intentional killing in the sense that killing is included in the object.

However, death itself is not the end of CP. Thomas maintains that it is not licit for any man to have the death of another man as his end simply. To will the death of another man, precisely as the death of this individual man, is sinful, he says.¹⁰⁸ The moral species of an act, as we have seen, is determined by its object, what the agent intends. If the avenger intends chiefly to inflict pain on the offender, his act is morally bad. The avenger's will should not "rest" (have its term) in the evil of the person being punished:

Accordingly, in the matter of vengeance, we must consider the mind of the avenger. For if his intention is directed chiefly to the evil of the person on whom he takes vengeance, and rests there, then his vengeance is altogether unlawful: because to take pleasure in another's evil belongs to hatred, which is contrary to the charity whereby we are bound to love all men....

If, however, the avenger's intention be directed chiefly to some good, to be obtained by means of the punishment of the person who has sinned (for instance

¹⁰⁴ *De Malo*, q. 1, a. 4.

¹⁰⁵ See *De Malo*, q. 1, a. 4.

¹⁰⁶ *De Malo*, q. 1, a. 4.

¹⁰⁷ *S.T. II-II*, q. 64, a. 7.

¹⁰⁸ "But as it is unlawful to take a man's life, except for the public authority acting for the common good, ... although even these sin if they be moved by private animosity." *S.T. II-II*, q. 64, a. 7.

that the sinner may amend, or at least that he may be restrained and others be not disturbed, that justice may be upheld, and God honored), then vengeance may be lawful, provided other due circumstances be observed.¹⁰⁹

In just punishment, the avenger chiefly intends some good, and his act is good. This discussion of ends is about the remote ends of punishment (amendment, deterrence, etc.), and so it presupposes that the act of punishment is not already an act bad in its species.

In the object of CP, the death of the evildoer is a means, toward the end of redressing a disorder. This does not contradict the principle that one may not do evil that good may come. The principle is that one may not *do* evil (the evil of fault), not that one may not choose evil (the evil of punishment or natural evil). Choosing death (as a means) is not in itself doing evil. The phrase *in itself* is key: what it means is that simply choosing death is not sufficiently specified for us to make a moral judgment. We must know why and by whom and to whom and perhaps even how death was chosen. This is the analysis that Thomas does in q. 64 of the *Secunda Secundae*. If death is not only chosen but willed, that is, not only the means but the end, then the act is unlawful, as Thomas says in the above passage on vengeance.

If we reject Thomas's distinction between death as punishment and murder, we will have difficulty justifying other forms of punishment. Finnis asks, "Why is it justified to choose and intend to inflict death or other irreparable harm to the basic good of life and health, by way of punishment?"¹¹⁰ The significance of the adjective *irreparable* is unclear, since according to Finnis, *any* choice to destroy, damage, or impede a basic good is in itself an evil act (destroying may imply irreparable harm, but damaging and

¹⁰⁹ *S.T.* II-II, q. 108, a. 1.

¹¹⁰ Finnis, *Aquinas*, 280, 281-282.

impeding do not). It seems, for instance, that according to Finnis's view of basic goods, starving a person for a few days would be evil, even if the person recovered his health afterwards. Perhaps Finnis focuses on irreparable harm because he wants to exclude punishments like death and maiming, but not other forms of punishment, like imprisonment.

In the classical view articulated by Aquinas, all punishment deprives the rational subject of some good (if not actually destroying, then at least damaging or impeding that good). Finnis tries to get around this problem by distinguishing between a choice that entails the loss of a basic good, and a choice to destroy, damage, or impede a basic good.¹¹¹ An example of the former would be the choice of martyrdom, in which the loss of bodily life is accepted in the pursuit of the basic good of religion. But punishment is a different case, since it involves not simply accepting the loss of a good, but actively depriving someone of a good.

The death penalty is a particularly clear instance of depriving someone of a good, but the punishment of imprisonment suggests a similar problem for the New Natural Law theorists. The good of practical reasonableness is "the basic good of being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and lifestyle and shaping one's own character."¹¹² But one's ability to choose his own actions and lifestyle is severely limited by being imprisoned. Therefore, to imprison someone is to act against the basic good of practical reasonableness—not destroying it, but certainly impeding it. Therefore, it would seem

¹¹¹ Finnis, *Moral Absolutes*, 11-12.

¹¹² Finnis, *Natural Law*, 88.

that Finnis ought to hold that intentionally to imprison a man is intrinsically evil, just as intentionally to kill a man is intrinsically evil. Grisez faces the same problem. He says that “if no human society is complete, if civil society is merely one form of community with limited concerns, then it is by no means clear that men associated in states may rightly kill wrongdoers to protect the common good if such killing would be morally forbidden to individuals.”¹¹³ Neither is it clear then why the state may imprison wrongdoers, when this “would be morally forbidden to individuals.” But Grisez and Finnis presumably do not deny the rightness of imprisoning, fining, or in general punishing wrongdoers—only of inflicting death.

When we look at how Thomas treats the question of imprisonment, we find that his position is entirely consistent with his treatment of the death penalty.

In the goods of the body three things may be considered in due order. First, the substantial integrity of the body, and this is injured by death or maiming. Secondly, pleasure or rest of the senses, and to this striking or anything causing a sense of pain is opposed. Thirdly, the movement or use of the members, and this is hindered by binding or imprisoning or any kind of detention.

Therefore it is unlawful to imprison or in any way detain a man, unless it be done according to the order of justice, either in punishment, or as a measure of precaution against some evil.¹¹⁴

Freedom of movement and use of one’s members is one of the bodily goods that belong to man because of his free will. Imprisoning an innocent man is therefore evil in itself. Imprisoning the guilty and imprisoning the innocent are different moral species, just as CP and murder are different moral species. Imprisoning a wrongdoer is not evil in itself, because, as Thomas replies to an objection, “A man who abuses the power entrusted to

¹¹³ Grisez, “NL Ethic of Killing,” 68-69.

¹¹⁴ *S.T.* II-II, q. 65, a. 3.

him deserves to lose it, and therefore when a man by sinning abuses the free use of his members, he becomes a fitting matter for imprisonment.”¹¹⁵ But does this mean that “it would be lawful for anyone to put a man in prison,” as the third objection suggests?

Thomas’s reply is that while

[i]t is lawful for anyone to restrain a man for a time from doing some unlawful deed there and then: as when a man prevents another from throwing himself over a precipice, or from striking another. But to him alone who has the right of disposing in general of the actions and of the life of another does it belong primarily to imprison or fetter, because by so doing he hinders him from doing not only evil but also good deeds.¹¹⁶

This distinction is parallel to the distinction between self-defense and CP. In self-defense, the private person does not intend to kill the evildoer, but only to prevent him from killing. Similarly, the private person who restrains another from an immanent evil does not intend to imprison the man, but to prevent him doing an evil. If he intended to imprison the man (i.e., to punish him by confining him, rather than to prevent an evil act), then the private person would be acting unlawfully, just as the man who intended to kill in self-defense would act unlawfully. Only the public official has the power to imprison and to kill intentionally.

The example of imprisonment shows that what is really at stake in this objection is not only the legitimacy of the death penalty, but the legitimacy of civil punishment in general. If we cannot use innocence and guilt to distinguish moral species of acts with the same physical description, then there is no basis for distinguishing punishment from other kinds of harming. Thomas avoids this absurdity by admitting that all punishment inflicts

¹¹⁵ *S.T.* II-II, q. 65, a. 3, ad 1. The objection reads: “An act which deals with undue matter is evil in its genus [*malus ex genere*], as stated above (I-II, Q. 18, A. 2). Now man, having a free-will, is undue matter for imprisonment which is inconsistent with free-will. Therefore it is unlawful to imprison a man.”

¹¹⁶ *S.T.* II-II q. 65, a. 3, ad 3.

an evil on someone, depriving him of some good. But the evil of punishment is not an evil act (a fault); moral goodness is determined by the object of the act: what the agent does, rather than what the patient suffers. The object of punishment is to redress a disorder produced by an offense. Intentionally causing an evil (punishment) is different that intentionally doing an evil (fault). While it is always wrong to do evil, it is not always wrong to cause evil. To punish an evildoer with death is intentionally to cause an evil as a means for the end of a just order.

In summary, inflicting the punishment of death is not doing evil that good may come, any more than imprisoning a man is doing evil that good may come. It is true that for Thomas, death and imprisonment are both evils, but to inflict an evil is not the same as to do evil. It is possible to deny this distinction between evils of fault and evils of punishment, but it does not seem that Finnis, Grisez, and most others who make this objection, actually want to deny the distinction. Rather, it seems that they are unwilling to apply it to the evil of death because of its final character.

G Conclusion

As I pointed out at the beginning of this chapter, these are not the only conceivable philosophical objections one might make to Thomas's account of capital punishment. For instance, the objections I have considered take for granted the idea that punishment is due to evil, a central tenet of Thomas's account, as we saw in Chapter I. In this view, punishment is a part of justice. Certainly there are other views of punishment. One evaluates punishment purely in terms of utility, as noted above. In this view,

punishment is a means to happiness, whether the happiness of the offender himself or of others. In this view, punishment loses its specific nature and even to continue to use the term is somewhat deceptive. It is not a matter of whether this or that act is a good punishment. Each act must be considered according to whether it contributes to happiness, whether we call it punishment or rehabilitation or education. In the Benthamite view of punishment, we see evidence that Thomas's ethics is not a utilitarian ethics in spite of its emphasis on happiness. A more extensive comparison is beyond the scope of this thesis.

Chapter V: Conclusion and Application

A Summary

I have argued in this thesis that according to Thomas Aquinas's teaching on punishment, the death penalty is a legitimate but not a necessary form of punishment. I began in Chapter I by examining Thomas's view of punishment in general. The philosophical problem of punishment is how acts otherwise bad are good when used as punishments. Thomas resolves this puzzle in his characteristic way, by making some distinctions. Evil in general, he says, must be understood as the privation of a particular good. Evil exists in a rational nature in two ways: the privation of a good belonging to its nature (punishment) or the privation of a good belonging to its operation (fault). Punishment, the privation of some good belonging to the agent, is evil in a certain respect, while fault, which is a privation in the proper operation of the will, is evil simply. More precisely, Thomas defines punishment as an evil suffered by an agent, contrary to his will, on account of some fault.

Yet this does not entirely solve the problem. Thomas admits that to deprive another of some good is to harm him, but to harm someone seems to be to do evil. How then is punishment not also fault? Here we looked at Thomas's view of human action. Briefly, not all acts of harming are bad acts. The fact that a kind of harm is inflicted as punishment enters the specification of the act itself. Thus, when he says that "it is unlawful to do a person a harm, except by way of punishment in the cause of justice"¹ he is not asserting a precept and then making an exception in the case of punishment.

¹ *S.T.* II-II, q. 65, a. 2.

Rather, he is distinguishing between two different kinds of acts (different moral species) which happen to look the same (same natural species).

In order to see why acts of punishment are specifically different from acts with the same external description, I addressed Thomas's positive account of punishment. Punishment is an act of the virtue of justice, specifically of vengeance, the virtue annexed to justice that moderates man's natural inclination to seek revenge. It is part of rectificatory justice; it rectifies the inequality produced by the offense. Thomas describes this rectification in terms of order. Someone who has acted against a specific order, such as the civil order, is guilty of a kind of overreaching because he has taken more than his due. Punishment redresses this inequality by taking something from the offender. This process can also be explained in terms of order. Every evil act is a disordered act, and punishment attempts to restore the order which has been disrupted. Thus, Thomas describes the object of an act of punishment as the restoration of order through depriving the offender of some good.

This is not a case of choosing an evil means for a good end. Punishment itself addresses disorder or rectifies inequality, without reference to any further end that might be achieved through punishment, such as deterrence. That acts of punishing are not only specifically different from other types of harming, but that they are in fact specifically *good* acts is not something that Thomas attempts to prove by a deductive argument. Rather, he refers us to a natural inclination. This is decisive for him because no natural inclination is an evil inclination. Given the natural human inclination to revenge wrongs, vengeance must be good. This point is easily obscured by frequent abuses of the

inclination, and sounds remarkably odd to the modern ear. Yet human societies make use of punishment as if it is just and good. Those who reject the idea of natural inclinations or reject the goodness of natural inclinations must find some other way to justify the practice of inflicting harm on those who have violated the civil order, or else give up the right to punish.

It is accurate to say that Thomas has a retributive theory of punishment, but this statement needs qualification. The specifically penal quality (retribution) defines punishment as punishment. But acts of punishment may also serve remote ends, especially deterrence. In fact, civil punishments must serve remote ends. He calls human punishments medicinal punishments to distinguish them from eternal punishments, which are perfectly retributive. Human punishments are imperfectly retributive (if they were not retributive they would not be punishment), but they use retribution insofar as it is useful to the common good.

Thomas's actual treatment of CP is brief, as we saw in Chapter II. The major source for this teaching is *S.T.* II-II, q. 64, a. 2. Although he cites the Book of Exodus as an authority for his teaching, Thomas does not argue that the Mosaic judicial code still obtains. His primary argument for the legitimacy of CP is a philosophical rather than a theological argument. He argues in q. 64 that the political community has the power to inflict death on those evildoers who threaten its existence. This power is based on the relationship of individual to community as a relationship of part to whole. The individual man is a part of the political community. It is true of any whole that it is prior to and greater than its parts and that the parts are for the sake of the whole. This is an instance of

the more general principle that the imperfect is for the sake of the perfect. Thomas compares the political community to another kind of whole, a living body. He does not mean to imply that the state is an organism or a substance, something he explicitly denies elsewhere. Rather, he considers both cases to fall under the principle of the priority of the whole to its parts, a principle which is true of all wholes (substantial or accidental) and which is known through simple apprehension.

Thomas justifies the use of CP in q. 64, but he also implies there that CP is a last resort, like amputating a limb, a measure to be undertaken only when no other course will serve the good of the whole. When necessary for the good of the community, it is within the community's power to execute an evildoer. But this question does not tell us whether besides being legitimate, CP is also necessary. For this we needed to take a broader view of Thomas's thought on law, especially on the derivation of human laws from natural law. Thomas maintains that some human laws are particular determinations of natural law, which have only the force of human law. Other human laws are derived from natural law as conclusions from premises, and these have the force of natural law. The natural law contains a precept that punishment is due to sin. Specific punishments are derivations from this precept in the first way: determinations that have the force of human law but not of natural law. Thus, punishments will vary from one time and place to another.

Yet changing laws is not usually a good idea, in this view, because custom is a great aid in promoting respect for the law. Frequent changes corrupt custom, and thereby diminish respect for law in general, even if the changes are valid. Therefore, human laws

should be changed when there is a significant good to be obtained or a significant evil to be avoided, but not otherwise.

For Thomas, punishments are determined by considering equality and utility, as well as custom. The just judge (or lawmaker) takes into account these particulars as he determines how to punish a specific crime. He tries to achieve an equality between offense and punishment, in that the evildoer suffers an evil of like severity to the evil he inflicted on another. He seeks the good of the community, and looks for the punishment that will best serve that good. He also takes the state of custom into account, choosing among those punishments which are customarily inflicted in his society. For Thomas, the utility of the punishment sometimes takes precedence over the equity of the punishment. That is, the preferable punishment is sometimes one that is greater or lesser than what is strictly proportional to the offense.

CP is an equitable punishment for crimes which deprive another of life (murder) or which threaten the lives of all by threatening the existence of the state (treason). It is useful for the common good only when nothing else can be done for the good of the community. Even evildoers are potentially contributors to the common good. If another punishment is available, one that will protect the community's good in the present and leave open the possibility of the evildoer's future contribution to the common good, such a punishment is better for the common good. In temporal punishments, we have seen, the utility or medicinal quality is always a goal. Human punishments use retribution to serve the common good, rather like a physician uses a potentially deadly instrument to treat wounds—with great caution.

Since in this view, determination of punishments is always done with reference to the common good, we had to consider the common good in Thomas's thought and in particular, the nature of the political common good. In Chapter III, I explored Thomas's conception of the political community as a whole. A whole, properly speaking, is something with unity of form. The form that unites a whole may be accidental or substantial. The political community is united by an accidental form: the political order (whether monarchical, aristocratic, or democratic) is the unifying form of this whole. Every whole is prior to its parts as a complete reality and in (formal and final) causality. The political community does not aim at perfect unity, but at the kind of unity proper to an accidental whole: the unity of order.

Understanding the political community as an accidental whole helps us understand why Thomas cannot maintain an organic view of the state. But since substantial wholes are more obviously wholes and more truly one than accidental wholes, we more easily understand in such cases how the good of parts is subordinate to the good of the whole. So he uses the living body as an illustration of the relation of parts to the whole. Insofar as something is a part of a whole—whether substantial or accidental—its good is subordinate to the good of the whole. This is implied in the nature of the part-whole relationship. But the parts are only subordinate to the whole insofar as they are parts. If the whole is an accidental whole and its parts are substances, then the parts also exist for themselves. This is the case with the political whole. Thus Thomas says that man is part of the state but not according to all that he is and has.

Since the good has the nature of an end, the good of the community is the end or final cause of the community. The good of the whole is prior to the good of the parts; the common good is prior as a cause because it extends to more effects. The political good is not an individual or private good, but it is not thereby a good that is foreign to the individual. In fact, the political common good is a proper good of the individual because it is a good that is perfective of him. In loving the common good above his own good, the individual is perfected as a human individual. For this reason, because love of the common good is perfective of man as a social being, Thomas says that it is natural for man to prefer the common good to his private good.

This is not to say, however, that all men do prefer the common good to their own goods. The inclination to serve the common good, when found in a rational being, may be acted upon or not. While brute animals instinctually act so as to further the good of the species, man must be trained to do this, as he must be trained to act in regard to other natural inclinations, such as those regarding food. Those who have acquired the virtue of loving the common good are capable of sacrificing even their lives for this good.

Yet we are concerned not primarily with those who willingly sacrifice themselves for the common good, but with those who present a threat to that good. While the law has human happiness as an extrinsic end, its intrinsic end is the order that constitutes the political common good. Laws are not made for the end of one or another individual's good, but for this good that can be shared. When there is a conflict between an individual's good and the common good, law acts for the common good. In an extreme case, the common good may be achievable in no other way than by the complete removal

of one of the members. This is only the case with an evildoer, since good persons benefit the common good, and only with an evildoer who threatens grave harm to the community, which can be alleviated in no other way. In such cases, the death penalty is a legitimate recourse.

In this case, punishment does for the vicious man by force what a virtuous man would do for himself by a deliberate choice: it directs him to the common good. It is in this sense that the evildoer becomes like a beast. All living things have a nature, which is an internal principle of movement. But man acts as an external principle of movement, directing the lower animals to his purposes (food, clothing, carrying burdens, etc.).² In this way, the lower animals serve the good of man, not ordering themselves to this end, but being ordered to it by an external agent. Similarly, Thomas says, the evildoer is ordered to an end by an external agent instead of ordering himself to that end; he “falls into the slavery of the beasts, so that he may be ordered to what is useful for others.”³ Yet he does not lose his human nature. Since beasts are by nature for the sake of man, a beast can be killed for the good of one man. But one man is not by nature for the sake of another man, so no private person may kill an evildoer, since “a man who has sinned is not by nature distinct from good men.”⁴ He may, however, be killed for the good of the community, which is to say, ordered toward the common good, which is really his proper good, though he does not voluntarily seek it.

² That the earth was made for man is revealed in Genesis, but is also accessible to reason, according to Thomas: since the imperfect is for the perfect, non-rational animals exist for rational animals.

³ *S.T. II-II*, q. 64, a. 2, ad 3.

⁴ *S.T. II-II*, q. 64, a. 3, ad 2.

In responding to objections to Thomas's account of CP, I chose those objections which share some of his basic premises, but take issue with a certain point of the application of a principle. I argued that his defense of the death penalty for heresy was consistent with the nature of the mediaeval political order, in which heresy was a crime against the civil order, similar to treason. In response to the objection that CP is not useful, I argued that while Thomas does consider the utility of punishment for the common good, this consideration is only possible where punishment is already justified in response to an evil. Where there are equitable alternatives to CP, however, and where CP is not necessary to the common good, the alternatives are in fact preferable in his view. I also addressed the objection that in Thomas's view CP would be necessary in order to achieve equity for certain crimes. I argued that this view is not compatible with Thomas's view that things derived from the natural law by way of determination have only the force of human law. For Thomas, temporal punishments always seek a medicinal end. Nor does he say that the medicinal end is the manifestation of a transcendent norm of divine justice, as one interpreter has claimed. If Thomas had used such a phrase, he would more likely have used it of eternal punishment, and not of temporal punishment.

I considered two objections to Thomas's account of the common good, as it affects his theory of CP. The first finds fault with his portrayal of the person as a part of the civil whole. It is true that if the part-whole relationship does not obtain between man and the state, his defense of CP does not stand. Thomas takes it as evident that individual persons are parts of the civil whole. He then applies the priority of the whole to the part to this specific instance. Thomas clearly maintains, on the other hand, that man's final

end is a supernatural end, which surpasses the whole political order. Being of a different genus, this end is incommensurable with the political common good, and cannot be subordinated to it. The temporal good of the individual is not suppressed in being subordinated to the political common good. Rather, the individual achieves his own temporal good most fully in preferring the political common good, and that common good in turn serves his eternal good.

The second common good objection claims that the political common good cannot be prior to the good of individuals because it is instrumental to those goods. From the previous response, we can say that in one way this is true. The political common good, which is a temporal good, is a lesser good than the final good of one man. The political common good is a just civil order. This civil order is a means toward the happiness of individuals, because it provides the conditions in which men can seek their final end. But it does not follow that the political common good is purely instrumental. It is good in itself, though it is not the highest good.

The final objection was that Thomas has no answer to the charge that inflicting the punishment of death is doing evil that good may come. But he does have an answer to this charge, which lies in the specific character of acts of punishing. For, he says, to suffer an evil is not the same as to do evil: this is the basic distinction between fault and punishment, on which his theory of punishment relies. In punishment, an evil is suffered, but an act of justice is done. An analysis of the act of punishing with death leads to the following conclusion: the agent does intend the death of the evildoer, but death is not the end of his volition. Acts of punishment are specifically different acts than acts of harming

that are externally the same. This difference is not only the basis for accepting CP, but for accepting all kinds of punishments and other public acts: fining is not stealing, imprisoning is not kidnapping.

B Application of the Thomistic Theory of CP to a Contemporary Case

Thomas's own analysis remains at a very general level, since his aim is provide the principles according to which such an analysis can be made. It has not been my aim in this thesis to apply his principles to a specific social/political situation. Such an undertaking would be worthwhile, but could not be conducted before we were clear about those principles. In this last section, I would like to cite a recent example of someone applying the Thomistic principles (without calling them Thomistic) to a specific time and place.

Philosopher Robert Spaemann, writing in 1970, makes some astute observations about the death penalty, in which he addresses the equity, utility, and the customary status of the penalty in West Germany.⁵ The post-war constitution in West Germany contained an article abolishing the death penalty.⁶ Spaemann notes that the abuse of the death penalty under the Third Reich was one of the motivating factors for this prohibition. At the time of the passing of this constitution (1949), minor Nazi war criminals were still being prosecuted, and some Germans thought these men ought to be pardoned rather than executed. This may have been at least part of the reason why Hans-

⁵ Robert Spaemann, "Todesstrafe" (1970), in *Grenzen zur Ethischen Dimension des Handelns*: 440-448.

⁶ Article 102: "Die Todesstrafe ist abgeschafft." (The death penalty is abolished.) Grundgesetz für die Bundesrepublik Deutschland.

Christoph Seebohm, head of the conservative Deutschen Partei, proposed abolition of the death penalty. Not long after the abolition, attempts were made to bring back the death penalty, even by the same party which had brought the measure to vote.⁷ The debate over the death penalty evidently was not over in 1970, when Spaemann reflected on the reasons for and against reinstating capital punishment in West Germany.

Spaemann begins by setting the terms of the debate. In questions of practical concern, he says, both sides must present reasons, but it is essential to know who has the burden of proof. Spaemann argues that the burden of proof lies with the one “who wants to change something from an existing state.”⁸ This seems to be another way of stating Aquinas’s presumption against the changing of laws. Any change in law, even a good change, tends to corrupt respect for law.⁹ Therefore, those who want to change a law must make a compelling case for some great good to be obtained or some great evil to be avoided. Of course, this presumes that the existing law is not inherently unjust (and therefore not a law at all, in Thomas’s view). Where the death penalty is not in use, those who wish to reinstate it must either show the inherent injustice of the existing law, or bear the burden of showing the good to be obtained by reinstating.

On the other hand, Spaemann notes, advocates of CP claim that the burden of proof in fact lies with the abolitionists, since abolition represents a deviation from human tradition, man’s “spontaneous feelings of justice” (*spontanen Gerechtigkeitsgefühls*) and

⁷ Spaemann, 440.

⁸ “... derjenige, der an einem bestehenden Zustand etwas ändern will, dies begründen muß.” Spaemann, 441.

⁹ *S.T.* I-II, q. 97, a. 2.

the majority conviction.¹⁰ If public opinion was the deciding factor, the case would have been clear, since in 1949, and for at least a decade after, polls showed that a majority supported the death penalty for murder.¹¹ But while Spaemann affirms the importance of considering public sentiment, he also argues that the feelings of the people cease to be sound if they defy reason.¹² As Thomas would say, custom has the force of law only insofar as it is good, and evil customs ought to be changed by law.¹³

Spaemann describes the rational basis for public sentiment in favor of the death penalty, which bears on its equity as a punishment for crimes of murder. The first duty of civil society is the protection of the lives of its citizens, but we feel instinctively that the murderer by his act has forfeited his right to this protection, that on account of his crime, his life “stands at the disposal” of the state.¹⁴ Spaemann notes that this was exactly the case in mediaeval Germanic law, in which a murderer was banished from society, and no longer protected by that society from anyone who wanted to kill him. He was truly an outlaw: outside of the law and the protection enjoyed by those under the law; thus, he could be robbed or killed without penalty.¹⁵ The life of the murderer is at the disposal of the state.

Yet to assert this is not to assert that the state is obliged to take the murderer’s life.¹⁶ This is where the utility of the death penalty comes in. Spaemann argues that

¹⁰ Spaemann, 441.

¹¹ Charles Lang, “The Paradoxes of a Death Penalty Stance” *Washington Post*, Saturday, June 4, 2005.

¹² Spaemann, 441.

¹³ *S.T.* I-II, q. 97, a. 3, ad 1.

¹⁴ Spaemann, 443: “Sein leben steht zur Disposition.”

¹⁵ Spaemann mentions this characteristic of mediaeval Germanic law, but it was not exclusive to Germanic peoples. See Walsh, *The Thirteenth: Greatest of Centuries*, 373.

¹⁶ Spaemann, 443.

besides the guilt of the murderer, there must be other compelling reasons to execute him. In other words, the fact that one man has killed another, or committed some equally serious wrong, is a necessary but not sufficient reason for claiming that he ought to be punished with death. Therefore, Spaemann goes on to consider whether there is an “additional good ground” for using the penalty.¹⁷ He does this by considering whether the elements of deterrence, reformation/rehabilitation, or atonement could provide a reason—in addition to the justification which he has already laid out, which is based on the idea that the murderer has forfeited his right to life—to use the death penalty.

Spaemann describes two kinds of deterrence with reference to CP:

Spezialprävention, the deterrence of this particular evildoer from further killing, etc., and *Generalprävention*, the deterrence of other potential evildoers from committing evil acts. The death penalty is obviously effective in achieving the first kind of deterrence, but Spaemann suggests that the same end can be accomplished with equal effectiveness by life imprisonment.¹⁸ As to the second kind of deterrence, Spaemann thinks that if CP truly deters people from murdering, and therefore saves innocent lives, this will be a good ground for its use. After all, the first duty of the state is to protect its citizens. However, Spaemann points to the lack of statistical evidence supporting a correlation between the presence of the death penalty in a state and the rate of capital crimes. He suggests that the criminal probably does not consider whether he will receive a life term or death for his crime, but rather whether he can escape penalty altogether. The best deterrent, therefore,

¹⁷ “Um ihn zu töten, bedürfte es eines zusätzlichen guten Grundes. Gibt es einen solchen?” Spaemann, 443.

¹⁸ Spaemann, 444.

is not a more severe penalty, but a good police force.¹⁹ Some have argued that the death penalty is at least necessary as a deterrent for violent acts by those already serving prison sentences. “On the contrary,” Spaemann suggests, “the tedium of confinement may well incite [such crimes] ...”²⁰ An increased term of imprisonment, solitary confinement, and deprivation of privileges may be equally or more effective as deterrents. Spaemann does not offer evidence that would answer this question, but merely another reason for questioning the utility of CP in comparison to other penalties. Since he places the burden of proof on one who would change the current penal law, the proponent of CP would have to supply evidence of the penalty’s superior deterrence.

The motive of reform (*Besserung*) can mean the reintegration of the criminal into society (re-socialization) and it can mean the inner change in the criminal (conversion). The former is obviously ruled out by CP, but the latter may be promoted by it. Confrontation with death may be the occasion for conversion, though it may also been the occasion for despair, as Spaemann notes. However, the conversion of the criminal cannot be the primary end of capital punishment:

The reforming effect can only originate in a threat of death, which does not have reformation directly as an end. Death may be expected as a fateful doom or as a just punishment, the expectation of which can change the man. But conversion will be made impossible, if it is made the end of the threat of punishment. Killing as a pedagogical measure is perverse.²¹

¹⁹ Spaemann, 444.

²⁰ Spaemann, 445.

²¹ “Die läuternde Wirkung kann nur ausgehen von einer Todesdrohung, die nicht unmittelbar diese Läuterung zum Ziel hat. Der Tod mag als schicksalhafter Verhängnis oder als gerechte Strafe erwartet werden, die Todeserwartung kann den Menschen wandeln. Die Wandlung aber wird unmöglich gemacht, wenn sie zum Zweck der Todesdrohung gemacht wird. Die Tötung als pädagogische Maßnahme ist pervers.” Spaemann, 445.

Thomas treats the conversion of the criminal in a similar way when he addresses the objection that since it is just to kill sinners, sinners need not be loved. The death penalty, Thomas says, should be motivated by charity, but charity for the common good. It may also have the affect of helping the sinner to convert, but the common good and not the individual good justifies it:

When, however, they [our friends] fall into very great wickedness, and become incurable, we ought no longer to show them friendliness. It is for this reason that both Divine and human laws command such like sinners to be put to death, because there is greater likelihood of their harming others than of their mending their ways. Nevertheless the judge puts this into effect, not out of hatred for the sinners, but out of the love of charity, by reason of which he prefers the public good to the life of the individual. Moreover the death inflicted by the judge profits the sinner, if he be converted, unto the expiation of his crime; and, if he be not converted, it profits so as to put an end to the sin, because the sinner is thus deprived of the power to sin any more.²²

Spaemann also considers the idea of atonement (*Sühne*) or penance (*Buße*) as determining the utility of the death penalty. Atonement refers to the idea that through punishment, the evildoer can make amends for his crime. This is associated with the idea of retribution, but it implies something more. Retribution simply means that the evildoer suffers something in response to evil he committed. Atonement implies that the evildoer accepts his punishment as a way of rectifying his relationship to society.

Spaemann makes three claims about the notion of atonement as applied to CP. First, it requires belief in an afterlife and eternal justice. If the criminal does not survive his punishment, then it cannot have an expiatory effect for him.²³ Second, atonement is a Christian idea, tied to the belief that eternal justice is achieved (satisfaction is made for

²² *S.T.* II-II, q. 25, a. 6, ad 2.

²³ Spaemann, 447.

all) by the death of Christ. Thus, St. Thomas can say that temporal punishment is not based on the principle of penance but on that of public welfare or the common good (this is the one reference to Aquinas in Spaemann's article). Third, atonement is not an invalid motive in temporal punishment, "if the extent of punishment is entirely dictated from the viewpoint of the common good." That is, atonement should play no role in determining punishment. Whether the punishment will in fact serve as expiation will depend on the one undergoing the punishment. If he accepts it as such, then it is expiatory. The penitentiary system creates the conditions in which a criminal may seek expiation, but in the end it depends on the individual offender.

Finally, Spaemann notes that the criminal is never completely bad. This does not mean that we should excuse him of his guilt, but neither should we place all the guilt of society on him. In removing him from our midst, society finds an easy alibi, saying with Cain, am I my brother's keeper? Spaemann calls us rather to accept the task of being our brothers' keepers, though this requires the expenditure of money and effort. This task will allow society "itself to perform the expiation, which the murderer owes his victim."²⁴

Spaemann provides us with an example of applying the Thomistic criteria of utility, equity, and custom to the death penalty in a modern context. This kind of application is just the kind of political prudence that Thomas thinks should be exercised in determining specific punishments from the natural law, and could also be applied to the practice of CP in the United States. The situation in the U.S. is considerably more

²⁴ Spaemann, 448.

complicated, given the variations in penal law from state to state. I will offer only the most general comments here, to indicate how such an analysis would proceed.

The determination of a specific punishment must be equitable, Thomas says; that is, the severity of the penalty should correspond to the severity of the offense. Could equity be preserved without the death penalty? In the *S.C.G.*, Thomas mentions the death penalty along with “perpetual exile” (*exilium perpetuum*) as equally fitting punishments for someone who offends against the state.²⁵ Exile is not a practicable option in the modern world, but life-imprisonment is. The latter requires more effort and expense on the part of society, but it has the same effect of cutting off the offender from society, without denying him the chance of reform. If perpetual exile is a punishment comparable to death, then life-imprisonment is as well.

Punishment must be useful to the common good; that is, it must serve the medicinal ends of punishment: protecting the members of society from harm and deterring others from evil. Is the good of a just social order achievable only through use of the death penalty? It seems not, since many murderers can and are imprisoned for life, effectively protecting the community from harm.²⁶ Given such an alternative, it is difficult to see how CP could be necessary to the common good.²⁷

²⁵ *S.C.G.* III, c. 144, n. 4.

²⁶ It is sometimes argued that CP is a necessary deterrent for crimes of murder committed in prison. would have to determine whether CP is an effective deterrent in such cases, and whether there are other ways of punishing such offenses.

²⁷ Statistics about deterrence and CP are notoriously difficult to interpret. The Federal Bureau of Investigation keeps records of national trends in crime and punishment, but warns against using this data to compare cities, counties, and states, because of the variety of factors contributing to crime. U.S. Bureau of Justice Statistics.

Specific punishments must also conform to human custom. If abolishing the death penalty would violate accepted custom, this would be a reason in favor of retaining it. If, on the other hand, what once was customary is no longer so, then law should reflect this change in custom. In most states, CP is used infrequently, even where violent crimes are frequent.²⁸ This suggests that the death penalty is no longer customary. The continued controversy surrounding CP is another indicator that this particular practice is not fully accepted by custom.

Clearly, much more work would need to be done to come to any definite conclusion about the state of this penalty in the United States today. Much of this is the province of political science, which examines the empirical data. Aquinas's general principles for determining punishments could serve as a guide in interpreting and in making use of the vast quantity of empirical data in the field of penal law and practice.

C The Value of the Teaching

I began this thesis by asking why we should draw on the views of a mediaeval theologian to address the contemporary problem of capital punishment. The value of doing so will appear more readily to the Catholic philosopher or theologian, yet I think the account has wider relevance, as I indicated in the Introduction. I want to conclude by reflecting of the value of Aquinas's natural law theory of punishment, using an essay of Alasdair MacIntyre's called "Natural Law as Subversive: The Case of Aquinas." This is

²⁸ The U.S. Department of Justice notes in its Bureau of Justice Statistics that in 2005, there were 603,500 arrests for violent crimes in the United States, including an estimated 16,692 homicides. That same year, there were 60 executions, and that number has decreased each following year (in 2008, 37 inmates were executed, the lowest number since 1994). U.S. Bureau of Justice Statistics.

not an essay about punishment, but what MacIntyre says there about Aquinas's natural law theory is relevant to our subject.

What MacIntyre draws out in this essay is an important implication of the naturalness of natural law. Since its precepts are accessible to anyone with reason, rulers do not have a monopoly on natural law, nor do lawyers or political scientists. The "plain person" then has a ground for disagreeing with a particular enactment of human law on the basis that it violates the natural law to which he has equal access. MacIntyre explains that for Aquinas, natural law is something known by all rational agents, and known by them as plain persons (or Aquinas would say, known by them as men). This is not to say that all rational agents have equal knowledge of all the precepts of natural law, but that knowledge of this kind is acquired by virtue of a capacity that all men share. Some more general precepts are presupposed by any practical inference, especially the most general precept that tells us to pursue good and avoid evil.²⁹

Aquinas himself was not a lawyer or a prince; he had no technical expertise in law, but only the more foundational expertise of a highly cultivated practical reason: "Aquinas's reflections upon Roman law and canon law had thus led him in an opposite direction from that taken by the most influential teachers of law in the universities. Nowhere is this more apparent than in his treatment of custom."³⁰ At the same time that Emperor Frederick II and King Louis IX were trying to stamp out local customs in favor of universal laws, Aquinas was arguing that "custom has the force of a law, abolishes

²⁹ MacIntyre, "Natural Law as Subversive," 68.

³⁰ MacIntyre, "Natural Law as Subversive," 70. "Philosophers and theologians are themselves in respect of the natural law no more than unusually reflective plain persons, able to present their reflections to others for the rational verdict of those others." Ibid., 77.

law, and is the interpreter of law.”³¹ As MacIntyre also points out, Aquinas’s view of custom was not the view that won out in thirteenth-century politics, but it offers a more reasonable alternative.

We have already seen how custom is an essential determinant in human punishments for Aquinas. The precept that punishment is due to evil acts is a general practical principle, known by plain persons. The determination of specific punishments, however, is relative to place and time, as what is useful to the common good and what is customary differs. A good lawmaker will not institute punishments that are clearly detrimental to the common good, or that are unusual, exotic, strange. Custom can change, and it does so through the repeated acts of plain persons. Law influences custom, just as custom influences law. Religion is another influence on custom. The movement to abolish slavery in the United States, for example, was heavily influenced by preachers and ordinary Christians. This is a case of religion changing culture through its influence on the actions of individual persons. This seems to be what John Paul II does in *Evangelium Vitae* and in a host of addresses, speeches, and homilies in which he encourages the faithful to oppose the death penalty. This impression is enforced by his frequent references to the battle between the “Culture of Life” and the “Culture of Death.” Cardinal Bernardin’s “consistent ethic of life” approach also aims at fostering this Culture of Life.³² They do not offer an argument against CP in absolute terms, not are they particularly interested in reasoning about its deterrent effects. Rather, they stress the

³¹ S.T. I-II, q. 97 a. 3. See MacIntyre, “Natural Law as Subversive,” 66, 71-72.

³² Cardinal Bernardin first publicly articulated a “Consistent Ethic of Life” in an address at Fordham University on Dec. 6, 1983.

value of all human life, and the power of witnessing to this value by rejecting CP. In a culture in which other forms of killing (abortion, euthanasia) are becoming customary, the Christian offers a powerful witness in respecting the lives of even the worst killers. In light of this Culture of Death, Thomas's comparison of the evildoer to a beast is all the more unfortunate. Yet it ought not to obscure the value of his theory of punishment in general, which gives the philosophical resources for acknowledging changes in custom of the kind which John Paul so eloquently teaches.

Appendix: Theological Objections to the Thomistic Account of Capital Punishment

Even though Aquinas's justification of CP is primarily a philosophical one, it would be foreign to his methodology to exclude theological objections altogether. In this chapter, I answer theological objections to Aquinas's view, which were not addressed directly in his own treatment of CP. Most importantly, I address the question of compatibility between Aquinas's teaching and contemporary Church teaching on CP. I argue that without referring to Aquinas, the *Catechism* and *E.V.* presuppose a Thomistic justification of CP: they maintain the understanding that CP is a legitimate but not a necessary form of punishment. It is only by virtue of this understanding that they can claim that the death penalty should rarely be used in the present context. For this presupposes that the penalty is legitimate but not necessary, which is precisely what Thomas has argued. Yet the documents claim that non-lethal punishments are preferable, because bloodless penalties are "more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person."¹ Thomas, too, was concerned with the conditions of the common good in determining specific punishments. He was also concerned with the disposition of those involved in punishing evildoers, which pertains to human dignity.

I assume the truth of divine revelation as contained in Sacred Scripture and in the teaching of the Magisterium of the Catholic Church. On account of this assumption, it might be accurate to describe what I do in this chapter as moral theology, rather than moral philosophy. I have noted that Thomas's own approach does not exclude theological

¹ *Evangelium vitae* 56.

objections. While he is clear about the distinction between reason and faith as two ways of coming to know truth, he does not strictly separate doing philosophy from doing theology. In treating a question such as the legitimacy of CP, he will present an objection drawn from Scripture next to an objection drawn from Aristotle. If in answering a particular question he finds that both reason and revelation offer an objection to a certain point, he responds to both. To ignore theological objections altogether would be to leave the question of coherence in Thomas's account of CP unanswered. For he would be the first to admit that if his account is contradicted by revelation, it ought to be discarded, for "other sciences derive their certainty from the natural light of human reason, which can err; whereas this [*sacra doctrina* or theology proper] derives its certitude from the light of the divine knowledge, which cannot be misled."²

A Scriptural Objections

We have seen that most of the objections Thomas himself considers are based on revelation. Those objections were representative of the scriptural objections we encounter today against CP. One objection he does not consider directly is whether CP is necessary to any human society, since there seems to be a divine mandate for the use of CP for murder in Genesis, where the Lord says to Noah: "For your lifeblood I will surely require a reckoning; of every beast I will require it and of man; of every man's brother I will require the life of man. Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image" (9:5-7).

² *S.T. I*, q. 1, a. 5.

It is fairly easy to respond to this objection when we consider the mode by which punishments are derived from the natural law. Contemporary Scripture scholars also note that the structure and style of Genesis 9 is different from the structure of biblical laws.³ Further, while the laws given through Moses were accompanied by the establishment of governing authority, this was not the case with the revelation to Noah. Penal laws are useless without an authority to execute them, but the covenant with Noah was not accompanied by any special authority to legislate and to punish. It seems more likely that God's words to Noah, rather than commanding a certain punishment, sanctioned and set limits to the already established practice of blood-vengeance.⁴

The more common theological objection is that CP is incompatible with the Gospel. In the Sermon on the Mount, for example, Jesus says to the crowds:

You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist one who is evil. But if any one strikes you on the right cheek, turn to him the other also ... You have heard that it was said 'You shall love your neighbor and hate your enemy.' But I say to you, Love your enemies, and pray for those who persecute you ... (Mt 5:38-39, 43-44).

It seems then that the Christian should not kill evildoers, both because killing is a form of resistance, and because one does not kill those whom one loves. Some argue that Aquinas is aware of the incompatibility of CP with the Sermon on the Mount, but that he

³ Megivern, 15: "Modern scholars have pointed out that the text actually has a chiastic structure, typical of Hebrew wisdom literature. Recent translations, including the *NAB*, indicate that the verse is thus poetic in form, yet biblical laws were never written in poetic form." In his analysis of Gen. 9 and Romans 13, Megivern makes some rather sweeping comments about the triumph of the historical-critical method of Scriptural exegesis. For example: "The biblical literalism that dominated the past has given way to methods that demand greater sophistication in using the Bible ... There is nothing so fruitless as wrangling over the meaning of the Bible when the real object of debate should be the presuppositions brought to its interpretation." (9) It is not necessary to agree with him in this respect, in order to agree with the specific point he makes about Gen 9:6.

⁴ "The ancient legal formula in verse 6 was probably originally intended to set limits to blood revenge." Dianne Bergant and Robert J. Karris, eds., *Collegeville Bible Commentary*, 49.

maintains a double standard, in which “the demands of the New Law are limited to the clerical caste, leaving the laity to live by a lower standard, which includes engaging in necessary bloodshed.”⁵

To answer the New Testament objections, we must return to the question on vengeance, where Thomas answers a more general objection of the same kind as the ones we are considering. The question arises in the context of vengeance rather than in the context of CP specifically, and this placement is not arbitrary. If Jesus’ sayings forbid the Christian from using CP, they also forbid the Christian from using lesser kinds of force. In fact, they seem to forbid vengeance altogether, since it involves resisting evildoers, rather than bearing patiently with them. It is interesting to note that in the question on vengeance, Thomas articulates the objection we are considering, using a passage not from the Sermon on the Mount, but from a gloss on the Song of Songs, showing that the idea of not resisting the wicked is found also in the Old Testament: “he that takes vengeance on a man does not bear with him. But we ought to bear with the wicked, for a gloss on Cant 2:2, ‘As the lily among the thorns,’ says: ‘He is not a good man that cannot bear with a wicked one.’ Therefore we should not take vengeance on the wicked.”⁶

To this objection, Thomas responds that while it is good to bear with wrongs inflicted on oneself, it is not good to bear with wrongs inflicted on God or on one’s neighbor: “The good bear with the wicked by enduring patiently, and in due manner, the wrongs they themselves receive from them: but they do not bear with them so as to

⁵ Megivern, 119.

⁶ *S.T.* II-II, q. 108, a. 1, arg. 2.

endure the wrongs they inflict on God and their neighbor.”⁷ Civil penalties are for the redressing of wrongs against one’s neighbor, which is why a representative of the whole community, and not the victim, is the one who punishes the offender. Vengeance, which is “the infliction of a penal evil on one who has sinned,” is therefore not prohibited by the injunction to bear with one who is evil.⁸

In the same article, he considers the following objection:

Further, a man is said to avenge himself when he takes revenge for wrongs inflicted on himself. But, seemingly, it is unlawful even for a judge to punish those who have wronged him: for Chrysostom [*Cf. *Opus Imperfectum*, Hom. v in Matth., falsely ascribed to St. Chrysostom] says: “Let us learn after Christ’s example to bear our own wrongs with magnanimity, yet not to suffer God’s wrongs, not even by listening to them.” Therefore vengeance seems to be unlawful.⁹

Thomas responds that one may be required not only to avenge wrongs against others (as the response to objection 2 argued), but even to avenge a wrong committed against oneself, if that wrong “reflects on God and the Church.” His three examples indicate that he is thinking of those who in some way represent God: the prophet Elijah called down fire to consume King Ahaziah’s men (2 Kings 1), the prophet Elisha cursed the boys who mocked him (2 Kings 2), and “Pope Sylverius excommunicated those who sent him into exile ...”¹⁰ In each of these examples, the offended person had a duty to avenge the wrong, not because of the offense against his person, but because it was also an offense against God. Aquinas does not present an objection from the Sermon on the Mount in this article; instead he refers us to Augustine’s commentary:

⁷ S.T. II-II, q. 108, a. 1, ad 2.

⁸ S.T. II-II, q. 108, a. 1.

⁹ S.T. II-II, q. 108, a. 1, arg. 4.

¹⁰ S.T. II-II, q. 108, a. 1, ad 4.

But in so far as the wrong inflicted on a man concerns his person, he should bear it patiently if this be expedient. For these precepts of patience are to be understood as referring to preparedness of the mind, as Augustine states (*De Sermon. Dom. in Monte* i).”¹¹

In his commentary, Augustine considers whether the Lord’s words in the Sermon on the Mount indicate that the Christian is forbidden from inflicting punishments (i.e., from taking vengeance). He concludes,

A punishment that is designed for the purpose of correction is not hereby forbidden; for that very punishment is an exercise of mercy, and is not incompatible with the firm resolve by which we are ready to suffer even further injuries from a man whose amendment we desire.¹²

Also commenting on the Sermon on the Mount, Dominican theologian Benedict Ashley writes,

Jesus counseled that it is better for one not to resist attack out of love for one’s enemies (Mt 5:38-48), and practiced this counsel himself when he forbade Peter to defend him, saying, “Put your sword back into its sheath, for all who take the sword will perish by the sword” (Mt 26:52). Yet, as we have seen, St. Paul (Rm 13:4b) and the First Epistle of Peter (2:14) prove that the early Church acknowledged not only the right but the obligation of the State to use force to maintain law and order ...¹³

Because the Gospel does not exclude the use of force for legitimate civil aims, neither does it exclude the use of the death penalty for the same aims. As for loving one’s enemies, Aquinas distinguishes between the different intentions that may motivate an act of vengeance.

Accordingly, in the matter of vengeance, we must consider the mind of the avenger. For if his intention is directed chiefly to the evil of the person on whom he takes vengeance, and rests there, then his vengeance is altogether unlawful:

¹¹ *S.T.* II-II, q. 108, a. 1, ad 4.

¹² Augustine, *De Sermon. Dom. in Monte* (*The Fathers of the Church: A New Translation*, trans. Denis J. Kavanagh (Washington, D. C.: Catholic University of America Press, 1963), Book I, c. 20, n. 63.

¹³ Benedict Ashley, *Living the Truth in Love*, 308.

because to take pleasure in another's evil belongs to hatred, which is contrary to the charity whereby we are bound to love all men....

If, however, the avenger's intention be directed chiefly to some good, to be obtained by mean of the punishment of the person who has sinned (for instance that the sinner may amend, or at least that he may be restrained and others be not disturbed, that justice may be upheld, and God honored), then vengeance may be lawful, provided other due circumstances be observed.¹⁴

In the *Disputed Question on Charity*, Aquinas affirms the validity of vengeance by saying that is possible both to love and to punish, and in some cases the former requires the latter, for "The person to whom this duty attaches can lawfully punish and even kill wrongdoers while still loving them out of charity."¹⁵

Thomas responds to a similar difficulty in relation to the passion of anger. One might conclude from certain passages in the Gospel that anger is forbidden.¹⁶ Yet anger, or "the desire for revenge," is not good or evil in itself, because revenge "may be desired both well and ill."¹⁷ While anger that precedes reason and "withdraws reason from its rectitude ..." is evil, anger that follows reason, that is "directed against vice and in accordance with reason ..." is good.¹⁸

As mentioned above, it is significant that these comments occur in the context of vengeance and anger in general, and not in the articles that deal with a particular penalty. For Jesus does not only command the believer not to kill his enemy or not to kill those who persecute him, which would rule out CP and warfare. He commands the believer to *love* his enemy and to *do good* to those who persecute him. These precepts do not pertain

¹⁴ *S.T. II-II*, q. 108, a. 1.

¹⁵ *Disputed Questions on the Virtues*, edited by E. M. Atkins and Thomas Williams, translated by E. M. Atkins (New York: Cambridge University Press, 2005), *De Caritate*, a. 8, ad 10.

¹⁶ E.g., Mt 5:22: "But I say to you that every one who is angry with his brother shall be liable to judgment."

¹⁷ *S.T. II-II*, q. 158, a. 1.

¹⁸ *S.T. II-II*, q. 158, a. 1, ad 2.

only to the most extreme forms of harm, but to all forms. If they rule out killing *absolutely* (as, for example, adultery is ruled out), then the Christian must reject all recourse to force, lethal or otherwise. This would mean, among other things, that Christians could not serve as soldiers, policemen, or judges. For Thomas, however, no such dilemma arises. He maintains that to harm another is forbidden, even prior to the Gospel, unless this harm is a penalty: “Now it is unlawful to do a person a harm, except by way of punishment in the cause of justice.”¹⁹ To punish as an act of justice is not to do evil but good, in that it restores the order violated by the offense.²⁰ At the same time, punishment seeks the good of the offender, in that it hopes to move him to hate the evil he has done, through the bitterness of the penalty.²¹

Why then does Thomas forbid clerics from being involved in executions, if to execute may be an act of the virtue of justice? He argues that it is unfitting for clerics to exact the death penalty, because they are ministers of the New Law, which does not prescribe particular judicial precepts, and also “because they are elected to the ministry of the altar, in which is represented the passion of the slain Christ, ‘who when he was struck, did not strike back,’ as is said in 1 Pet. 2.”²² This would be a double standard if killing was absolutely incompatible with the Gospel. But we have seen that for Thomas, loving and doing good to one’s enemies is compatible with punishing them. The New Law demands that one be willing to suffer persecution and injury to one’s own person,

¹⁹ *S.T.* II-II, q. 65, a. 2.

²⁰ See *S.T.* I-II, q. 87, a. 1.

²¹ See *S.T.* II-II, q. 108, a. 1; SCG III, c. 142.

²² *S.T.* II-II, q. 64, a. 4.

for the sake of Christ, but does not demand that one abstain from all bloodshed. Benedict Ashley expresses the point using the classical distinction between precept and counsel:

Hence the words of Jesus just quoted [Mt 26:52] must be understood not a universal precept, but as a counsel to be followed as a way of perfection by individuals when the protection of third parties is not in question. That is, when only one's own safety is at stake, it is a Christ-like act of love for one's enemy to let oneself be injured by that enemy rather than to injure him.²³

To be involved in official killing (as punishment or in warfare) can be an act of justice, according to Aquinas, but “[t]he ministry of clerics is concerned with better things than corporal slayings, namely with things pertaining to spiritual welfare, and therefore it is not fitting for them to meddle in lesser things.”²⁴ This reasoning would apply not only to punishing by death, but to meting out other forms of civil punishment, or in general to involvement in political affairs. Thus, the current Code of Canon Law bars clerics from civil offices.²⁵

Aquinas's reasoning about fittingness does not differ substantially from the view of Augustine. As a philosopher and theologian, Augustine maintains the legitimacy of the state's right to punish with death and to wage war in certain circumstances.²⁶ In pastoral letters, however, he encourages those in civil authority to give lesser penalties to those who had harmed Christians or destroyed Church property.²⁷ As a bishop, he is concerned with “things pertaining to spiritual welfare,” including the welfare of heretics. Even so,

²³ Ashley, 309.

²⁴ *S.T.* II-II, q. 64, a. 4, ad 2.

²⁵ The 1983 Code states, “Clerics are forbidden to assume public office whenever it means sharing in the exercise of civil power.” *The Code of Canon Law in English Translation* (London: Collins Liturgical Publications, 1983), Can. 285.3.

²⁶ *D.C.D.* I.21: “There are however certain exceptions to the law against killing, made by the authority of God himself.... For this reason the commandment forbidding killing was not broken by those who have waged wars on the authority of God, or those who have imposed the death-penalty on criminals when representing the authority of the State in accordance with the law of the State ...”

²⁷ See Letters 100 (to Donatus), 104 (to Nectarius), 139 (to Marcellinus).

he merely counsels and encourages magistrates to abstain from the death penalty; he does not condemn the practice. We have no evidence of Aquinas responding to pastoral situations such as those Augustine faced; but Augustine was after all a bishop with a flock to tend, while Thomas was a mendicant professor. On the speculative level, however, the two Doctors are in agreement that CP is not forbidden by the Gospel.

B Recent Church Teaching on CP

Another and more difficult kind of theological objection to the death penalty is based on recent teachings of the Catholic Magisterium.²⁸ Here we venture outside of objections that Aquinas considered, or could have considered. Nonetheless, bringing his theory into contact with such objections is appropriate, since he did not exclude theological objections to his philosophical arguments. It is unavoidable for those who take the doctrine of the Magisterium as a source of true teaching, as Aquinas certainly did. I begin with a brief analysis of the two most authoritative sources for recent Church teaching on the death penalty, *Evangelium Vitae* (*E.V.*) and the *Catechism of the Catholic Church*. I limit my reflections to these two documents, noting however that individual bishops and conferences of bishops have written similarly on CP.²⁹ In addition, the Vatican recently has supported the United Nations in its call for a moratorium on the

²⁸ I do not propose to consider Christian thought on CP as it has developed in the various Protestant denominations, since this is not directly relevant to my thesis.

²⁹ The United States Council of Catholic Bishops has consistently opposed the death penalty since at least 1974. In 1980, it published its first comprehensive statement calling for an end to the use of the death penalty. "Catholic Campaign to End the Use of the Death Penalty."

death penalty.³⁰ The arguments made by individual bishops and conferences of bishops, and other ecclesial statements on CP, have been consistent with those found in the *Catechism* and *E.V.*, and typically refer to these two documents as authorities.³¹

The *Catechism* makes the following statement under the heading “Capital Punishment”:

Assuming that the guilty party’s identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.

If, however, non-lethal means are sufficient to defend and protect people’s safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.

Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity “are very rare, if not practically non-existent.”³²

E.V. follows the same line of thought in its discussion of the death penalty:

On this matter there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God’s plan for man and society. The primary purpose of the punishment which society inflicts is “to redress the disorder caused by the offence.” Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfils the purpose of defending public order and ensuring people’s safety, while at the same

³⁰ Benedict XVI, “Address to the Diplomatic Corps,” 7 January 2008: “I rejoice that on 18 December last the General Assembly of the United Nations adopted a resolution calling upon States to institute a moratorium on the use of the death penalty, and I earnestly hope that this initiative will lead to public debate on the sacred character of human life.”

³¹ For discussion of the doctrinal status of various Church statements on CP, see E. Christian Brugger, “Catholic Moral Teaching and the Problem of Capital Punishment” *Thomist* 68 (2004). I will not address this theological question in my paper.

³² C.C.C. 2267, quoting John Paul II, *Evangelium Vitae* 56.

time offering the offender an incentive and help to change his or her behaviour and be rehabilitated. It is clear that, for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.

In any event, the principle set forth in the new *Catechism of the Catholic Church* remains valid: “If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.”³³

The first thing to be noted about these statements from *E.V.* and the *Catechism* is that neither of them rule out the death penalty altogether. However, both texts say that non-lethal punishments are to be preferred. Second, both texts maintain that the death penalty is only licit “in cases of absolute necessity,” or in other words, if it is “the only possible way of effectively defending human lives against the unjust aggressor.” Third, the documents offer a practical observation: that is, the penal system today is such that cases fitting this description “are very rare, if not practically non-existent.”

The first principle, that non-lethal punishments are to be preferred to the death penalty, presupposes the legitimacy of CP, though no argument for its legitimacy is offered. Clearly, legitimacy is not the primary concern here. It is helpful to compare the language used in these texts with the language used in the same documents to treat the question of abortion. In reference to “the unspeakable crime of abortion,” the language is unqualified: “*direct abortion, that is, abortion willed as an end or as a means, always*

³³ John Paul II, Encyclical letter *Evangelium Vitae* (25 March 1995), n. 56. The encyclical quotes the early edition of the new catechism (the English translation was published in 1994). When the *Editio Typica* was issued in 1997, it included the reference to *Evangelium Vitae*.

constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being.”³⁴ In reference to the death penalty, on the other hand, no comparable claim is made; neither *E.V.* nor the *Catechism* say that to kill a person as punishment is always a grave moral disorder. Rather, they limit the use of the penalty to cases of “absolute necessity,” and say that such cases now are “very rare, if not practically non-existent.” Yet by admitting that CP may be chosen as a valid means of punishment, however rarely or theoretically, they do not place CP in the category of “grave moral disorder.”

A normative claim is being made in these selections: non-lethal punishments should be preferred (“public authority must limit itself to such means” and “ought not go to the extreme of executing the offender except in cases of absolute necessity”). This does not imply that public authorities always *do* prefer non-lethal means when they have the choice (it seems likely that they do not), but that in principle these means are better in some decisive way, and therefore ought to be preferred. In what way are non-lethal punishments better than the death penalty? The documents give two reasons: “the concrete conditions of the common good” and “the dignity of the human person.”

The second principle spells out the limit given in the first principle (that non-lethal punishments are to be preferred): it is licit to choose a lethal punishment when non-lethal means are insufficient “to defend human lives” and “to protect public order and the safety of persons.” If, in some case, the death penalty is the only way to defend lives and protect order, it may be chosen. There seem to be two possible interpretations of this second principle: (1) in certain (rare) cases, it is permissible but not necessary to use the

³⁴ *E.V.* 62 (emphasis in original). The same language is used in *C.C.C.* 2271.

death penalty or (2) in certain (rare) cases, it is permissible *and* necessary to use the death penalty. I think the second interpretation is correct, but it could also be misleading. In a particular case, it is not that one must first determine whether the penalty is permissible in that case, and then whether it is necessary. Rather, its permissibility is determined by its necessity. If, and only if, the penalty is necessary, it is permissible. But this leaves us with a puzzle. If the death penalty is a morally legitimate form of punishment, why should the presumption always be *against* its use?

The puzzle is only confirmed when we consider the many pleas made by John Paul II on behalf of criminals condemned to death and his frequent criticism of the death penalty in speeches, homilies, etc. As moral theologian Janet Smith suggests, it almost seems that John Paul would like to say that CP is intrinsically evil, but either will not or cannot do so:

Other Pope-watchers have shared with me their suspicions that Pope John Paul II may well wish he could say that capital punishment is intrinsically evil and thus ought never to be done. Such a position would, of course, be a radical break with traditional Church teaching and thus is unlikely to be true, if not impossible to be true.³⁵

Some have answered this puzzle with the idea of a development of Catholic doctrine in regard to CP. In this view, the Church is heading toward an absolute condemnation of CP as per se evil, though she has not yet made a definitive statement to that effect. Thomas's account is compatible with a relative condemnation of CP, one that says for instance, that other punishments are preferable or that in the present social context, CP ought not be used, but it is incompatible with an absolute condemnation of CP. If the Church is

³⁵ "Rethinking Capital Punishment," *Catholic Dossier* 4.

teaching, or at some point in the future does teach that CP is per se evil, then those who accept the authority of the Church must reject Thomas's account.

C First Objection: There Has Been a Development of Doctrine on CP

St. Thomas's teaching on CP defined Church statements on this subject for centuries, but his teaching is notably absent from the two most recent authoritative documents, which mention CP, *E.V.* and the *Catechism*. Some have interpreted this absence as a conscious departure from traditional thinking on the death penalty. They read these documents as a "development of doctrine," pointing toward an absolute condemnation of CP, and indeed of all intentional killing.³⁶

The most articulate presentation of the development of doctrine position to date is found in E. Christian Brugger's book, *Capital Punishment and the Roman Catholic Moral Tradition* (2003). This careful study deserves our sustained attention, if we are to understand the relationship between Thomas's teaching and recent Catholic teaching on CP. Brugger begins with the teaching on CP found in the 1997 *Catechism*, and he then traces Church teaching from apostolic and patristic times through the pontificate of John Paul II. In the final section of the book, he argues that a development of doctrine is taking place. Brugger makes several important claims in his book: first, that what the *Catechism* calls *poena mortis* is not punishment, but collective self-defense; second, that CP is not a morally licit punishment because it is intentional killing, and all intentional killing is

³⁶ There is diversity among those who claim that *E.V.* develops the doctrine of CP, but I focus here on what I take to be the most common interpretation: that the Church is tending toward a condemnation of all intentional killing. This position is maintained by E. Christian Brugger, Germain Grisez, and Gerald V. Bradley, among others.

morally illicit; and third, that the doctrine of the Catholic Church is developing toward an absolute prohibition of capital punishment.

Brugger notes that the 1997 *Catechism* treats the death penalty under the heading, “Legitimate Defense.” In contrast, the *Roman Catechism* treats it under the heading “Exceptions to the Fifth Commandment.” Brugger takes this to be a significant move:

It is my contention that something new is being said about the morality of capital punishment in sections 2263-2267 of the *Catechism of the Catholic Church* ... Because the text strictly ties its analysis to a model of *self-defense* against the wider conceptual backdrop of *double-effect* reasoning, it is reasonable to conclude (1) that the act referred to in the text as *poena mortis* is not, precisely speaking, an act of punishment, but an act of collective self-defense by the community against a dangerous internal aggressor, and (2) that capital punishment as well as all acts of legitimate killing should be limited by conditions traditionally used to limit lawful killing in private self-defense.³⁷

In other words, Brugger interprets the *Catechism* as saying that death may not be chosen as a form of punishment, but that in some cases public authority may kill a guilty individual as an act of social self-defense. Brugger contrasts his interpretation of the *Catechism* with the “plain-face interpretation” offered by, among others, Cardinal Ratzinger:

Clearly, the Holy Father [John Paul II] has not altered the doctrinal principles which pertain to this issue as they are presented in the *Catechism*, but has simply deepened the application of such principles in the context of present-day historical circumstances. Thus, where other means for the self-defense of society are possible and adequate, the death penalty may be permitted to disappear. Such a development, occurring within society and leading to the foregoing of this type of punishment, is something good and ought to be hoped for.³⁸

³⁷ E. Christian Brugger, *Capital Punishment and the Roman Catholic Moral Tradition*, 12. See also Brugger’s “Catholic Moral Teaching and the Problem of Capital Punishment,” 41-67, 43.

³⁸ This passage is an excerpt from a letter written by Cardinal Ratzinger to Fr. Richard Neuhaus and published in “The Public Square,” *First Things*, no. 56 (October 1995), 83. Cited in Brugger, 12.

According to Brugger, on the other hand, the Church teaches in the 1997 *Catechism* that legitimate defense, whether personal or communal, should be understood using the idea of double effect. “Corporate” defense is subject to the same moral limits as individual self-defense. Commenting on the transition from self-defense to communal defense in the *Catechism*, Brugger says:

Although the context has changed from addressing the needs of an individual to those of a community, and from the right of an individual to defend his own life to the rights and duties of public authority to defend the community for which it is responsible, the context is otherwise the same. We are still referring to the need (previously individual, and now corporate) to repel an aggressor—here including both internal and foreign aggressors—and the requirement that in so doing, only the degree of force necessary to render an aggressor unable to cause harm should be used. The act of legitimate defense here, as before, is an act of self-defense. While section 2265 does not explicitly state that any death following from this act of self-defense must be unintended, the reference to collective self-defense in 2263 requires that this be the meaning of 2265.³⁹

Is CP a legitimate act of collective self-defense? If CP is intentional killing, Brugger’s answer is no. Self-defense is legitimate when it does not intend death. But one necessarily intends death when performing an execution:

The lethal nature of the punishment is not ancillary to what is chosen; it is the measure of punishment chosen ... In the case at hand, then, the plan of action very clearly includes the criminal’s death. Until the criminal is dead, the punishment is not complete nor is the disorder redressed. In other words, death is (among other things) what we are trying to bring about ... The intent to kill cannot be separated from capital punishment, whatever other intentions accompany it.⁴⁰

However, Brugger thinks that the *Catechism* also uses CP to refer to something else: an act of legitimate defense by society against an internal aggressor in which the death of the offender is not intended. Such might be the case in a hostage situation or a prison riot.

³⁹ Brugger, *CP and the RC Moral Tradition*, 17-18.

⁴⁰ Brugger, *CP and the RC Moral Tradition*, 37.

In Part III, “Rethinking the Church’s Traditional Notion of Justifiable Homicide,” Brugger addresses the question of whether CP is the kind of teaching subject to doctrinal development. He notes that doctrines (whether of faith or morals) may be infallibly asserted or non-infallibly asserted.⁴¹ For the former, only one kind of development is possible, that which brings about “a fuller and more perfect understanding, and hence verbal expression, of the divine mystery, while all the time maintaining continuity with antecedent principles and types.”⁴² For non-infallibly asserted teachings, Brugger suggests “that there are two possible patterns of development ... The first I will call *development as filtering and reformulating*, and the second, *development as specification*.”⁴³ The first pattern occurs when an assertion contains both true and false propositions. Over time, the false propositions are filtered out, leaving only the true teaching. For an example, Brugger offers the true teaching on reservation of priestly ordination to men alone, which was at one time asserted together with false propositions about the inferiority of women.⁴⁴

By specification, the second pattern of development, Brugger does not mean a particular determination of a more general teaching, as the name might imply. Rather, he means a clarification of ambiguities in a true teaching.

For example, if “murder” is taken to mean any deliberate act that foreseeably results in the death of another, then many more acts are characterized as murder than if “murder” is rightly defined as killing the innocent with intent. Development in this instance would mean specifying with increasing precision the nature of the moral acts under consideration, or the language with which the acts

⁴¹ Brugger, *CP and the RC Moral Tradition*, 153.

⁴² Brugger, *CP and the RC Moral Tradition*, 156.

⁴³ Brugger, *CP and the RC Moral Tradition*, 158.

⁴⁴ Brugger, *CP and the RC Moral Tradition*, 159.

have hitherto been described, with the possible result that the sense in which a moral doctrine has been interpreted stands in need of revisions.⁴⁵

After showing that the teaching on CP has not been asserted infallibly,⁴⁶ Brugger argues that the Church is now developing this teaching by filtering and reformulating it, the first mode of development. The filtered teaching put forth in the *Catechism* then stands in need of clarification, the second mode of development.

Brugger proposes, as the traditional teaching of the Church on CP, the following complex assertion A:

for human dignity and the common good of society to be honored and preserved, the deliberate crimes—especially grave crimes—of social offenders should be punished, if need be with death. Therefore capital punishment is legitimate and should be defended in the face of those who publicly deny it and/or seek to have it abolished.⁴⁷

He divides this assertion into four separate propositions:

(Y) deliberate crime brings into existence a disorder in civil society, and grave crime, grave disorder; (K) to preserve the conditions for the common good this disorder must be redressed; (L) proportionate punishment can redress this disorder; (M) it is legitimate to impose proportionate punishment upon offenders, including grave punishments on grave offenders; and (Z) the act of killing entailed in lawfully executed capital punishment is legitimate and should not be subsumed under the norm forbidding homicide.⁴⁸

Brugger suggests that while propositions Y, K, L, and M are true, proposition Z is false and needs to be filtered out of complex assertion A, producing a new complex assertion B:

The nature of certain offenses is such that an offender could not complain of distributive injustice (i.e., unfairness) if, as punishment, he were deprived of life;

⁴⁵ Brugger, *CP and the RC Moral Tradition*, 160-161.

⁴⁶ Brugger claims that in the case of CP, all the conditions (described in *Lumen Gentium*) for an infallible exercise of the ordinary and universal magisterium have been met, except the following: “the judgment upon which the bishops agree must be proposed ‘as one that has *to be definitively held*’ (*definitive tenenda*) (LG, no. 25).” Brugger, *CP and the RC Moral Tradition*, 146.

⁴⁷ Brugger, *CP and the RC Moral Tradition*, 161 (emphasis removed).

⁴⁸ Brugger, *CP and the RC Moral Tradition*, 161.

yet capital punishment is still wrong, not because it is unfair (in the distributive sense just stated), but because as an act precisely intended to destroy human life it is a violation of inalienable human dignity and hence a violation of the norm singling out and forbidding all such acts. Therefore, although punishing deliberate crime is good and necessary for the maintenance of the common good, non-lethal punishments should always be chosen.⁴⁹

He concludes, “This is essentially the conclusion that, as I have argued in chapter 1, lies inchoate in the teaching of the *Catechism of the Catholic Church*.”⁵⁰

This new assertion depends, of course, on the existence of a norm against all intentional killing. Brugger claims that this norm is contained, at least implicitly, in the 1997 *Catechism*, but adds that the terms of this teaching, “would need careful *specification* in order to make clear what kinds of acts are and are not singled out by it as contrary to human good.”⁵¹ This he does in his final chapter, entitled “Toward an Ethical Judgment that Capital Punishment is Intrinsically Wrong.” In the first chapter, Brugger presented evidence for his conclusion that the *Catechism* is doing something new with regard to CP; in this last chapter, he presents the term of this movement: an absolute norm against intentional killing of human persons. Brugger admits, “The Catholic Church has never taught that all intentional killing is wrong,” and that the norm against intentional killing of the innocent is “the model used by Aquinas and by *Evangelium Vitae* in the formulations of its three most authoritative negative norms.”⁵² Nonetheless, Brugger wants to formulate a rational account of the norm against intentional killing which he takes to be “inchoate” in the *Catechism*’s teaching on CP.

⁴⁹ Brugger, *CP and the RC Moral Tradition*, 162.

⁵⁰ Brugger, *CP and the RC Moral Tradition*, 162.

⁵¹ Brugger, *CP and the RC Moral Tradition*, 162.

⁵² Brugger, *CP and the RC Moral Tradition*, 165 (footnote omitted).

Brugger begins by criticizing Thomas's account, which he rightly takes to be the most developed philosophical defense of CP in the Christian tradition. Brugger's two main objections are ones that we have seen before. He rejects Thomas's part-whole defense of CP, and the comparison of sinner to beast. He concludes, in words similar to those of Finnis:⁵³

Aquinas' account fails to respond to the charge that capital punishment, because it is the willful destruction of an intrinsic human good, is wrong per se. In the absence of Aquinas' arguments for the lawfulness of capital punishment, Catholic tradition (and, for that matter, Western philosophical tradition) has no other philosophical ground from which to argue that the object chosen in a deliberate act of killing the guilty—by the state or any other person—is, morally speaking, fundamentally different from the object chosen in an act of killing the innocent.⁵⁴

According to Brugger, the moral object of an act of execution is the same as the moral object of an act of murder; or in other words, that CP is murder: "Simply put, I cannot will the death of a human person, any human person, innocent or guilty, with a good will."⁵⁵

Brugger's interpretation of the *Catechism* as implicitly affirming an absolute prohibition of intentional killing is affirmed also by Finnis, Grisez, and Joseph Boyle:

The *Catechism of the Catholic Church*, most plainly in its revised edition—in relation to killing in capital punishment, and war, and in general ... has adopted a position like the one defended for thirty years by Grisez. Killing of human beings is justifiable only insofar as it is not intended. [Footnote: The revised CCC's entire treatment of cases of justifiable killing is put under the aegis of Aquinas's distinction between the "double effect" of lethal self-defensive actions that do not intend the killing of the aggressor ...]⁵⁶

⁵³ Finnis says that Aquinas fails "to reply convincingly to the argument that capital punishment, since it involves the intent to kill as a means, is 'doing evil that good may come' ..." Finnis, *Aquinas*, 282.

⁵⁴ Brugger, *CP and the RC Moral Tradition*, 179.

⁵⁵ Brugger, *CP and the RC Moral Tradition*, 34.

⁵⁶ John Finnis, Germain Grisez, and Joseph Boyle, "'Direct' and 'Indirect': A Reply to Critics of our Action Theory," 43.

Gerard Bradley agrees with Finnis, Grisez, and Boyle that *E.V.* and the *Catechism* aim at an absolute norm, but disagrees about whether CP is thereby ruled out. He includes CP as public defense of society, which is the “same moral species” as private self-defense.⁵⁷ Both seek to “disable aggressors without intending to kill.”⁵⁸ Brugger makes a similar claim. If Bradley and Brugger are right, however, CP as punishment is ruled out. If the *Catechism* does presuppose a norm against intentional killing, then for Catholics, this would be a decisive objection to Thomas’s teaching on CP.

Response to the First Objection

In Chapter IV, I considered the idea of a norm against intentional killing in response to the objections of Grisez and Finnis. I argued that this norm does not follow from a Thomistic understanding of human action and that it has serious philosophical difficulties in its own right. No absolute prohibition of intentional killing can be derived from natural law, as Thomas understood it. Yet even if the natural law contains no such norm, revealed law might. Thomas tells us that “although the argument from authority based on human reason is the weakest, yet the argument from authority based on divine revelation is the strongest.”⁵⁹

The Church teaches authentically on morality as well as faith, but arguments based on what the Church might teach in the future (the end point of a development that is thought to be occurring now) are doubtful. We can only reason about what we know

⁵⁷ Bradley, 161.

⁵⁸ Bradley, 161.

⁵⁹ *S.T.* I, q. 1, a. 8, ad 2.

and not what we might know in the future. Therefore, we can only reason about what has been revealed, and not what might be revealed by the continued working of the Holy Spirit in the Church. The Magisterium has not absolutely condemned capital punishment. If it is not evident from reason that CP is immoral, and if it has not (at least not yet) been revealed to us through the Church's ever-deepening interpretation on the Word of God, then we have no basis for making such a claim. Still, some have argued that an absolute condemnation of CP is implicit in some Church teachings, and so we must consider whether this is so. Secondly, we must consider whether the *Catechism* applies double-effect reasoning to CP, as Brugger suggests, as a way of reconciling its new teaching to the tradition. This would mean essentially that while punishing by death is always wrong, what we normally think of as punishment by death is really a kind of self-defense, which is justified because the killing is not what is intended.

Brugger admits that the norm against intentional killing is not found in the tradition of Catholic moral theology, but thinks that the norm is implicitly affirmed in the 1997 *Catechism*:

In reformulating the Catholic position on justifiable violence to exclude intentional harm to basic goods, I have tried to develop a systematic and philosophically consistent account of the morally relevant elements of the *new position* that (I have argued) lies implicit in the teaching of the *Catechism of the Catholic Church* on capital punishment.⁶⁰

Brugger rightly notes that the 1997 *Catechism* treats punishment, bearing arms, and self-defense under the heading of "legitimate defense," and that the use of this category in reference to all three kinds of killing is something new. He takes this new grouping as an

⁶⁰ Brugger, *CP and the RC Moral Tradition*, 187-88.

indication that the *Catechism* wants to treat war and capital punishment as specifically similar to self-defense. In itself, the grouping of war, punishment, and self-defense does not say anything about the species of the acts. Previous catechisms, such as the *Roman Catechism*, treat these topics together, without implying that they are specifically the same kind of act. Thomas, as we saw in Chapter II, treats self-defense, CP, and other forms of killing together in q. 64, and he clearly does not think they are the same species of act.

The *Catechism* does not say or imply that all kinds of legitimate defense are specifically the same. There may be different species of legitimate defense; the traditional view has at least three: self-defense by private persons, self-defense by persons in public authority, and defense of others by an act of punishment, which are all specifically different.⁶¹ After addressing self-defense, section 2266 introduces civil punishment:

The efforts of the state to curb the spread of behavior harmful to people's rights and to the basic rules of civil society correspond to the requirement of safeguarding the common good. Legitimate public authority has the right and duty to inflict punishment proportionate to the gravity of the offense. Punishment has the primary aim of redressing the disorder introduced by the offense. When it is willingly accepted by the guilty party, it assumes the value of expiation. Punishment then, in addition to defending public order and protecting people's safety, has a medicinal purpose: as far as possible, it must contribute to the correction of the guilty party.

Several concepts are introduced in this paragraph, which were not part of the explanation of self-defense: safeguarding the common good, legitimate public authority, and the presence of a guilty party. The *Compendium of the Catechism of the Catholic Church* expands on this definition: "A punishment imposed by legitimate public authority has the

⁶¹ See *S.T. II-II*, q. 64, a. 7.

aim of redressing the disorder introduced by the offense, of defending public order and people's safety, and contributing to the correction of the guilty party."⁶² The *Compendium* and the *Catechism* essentially affirm the teaching of the *Roman Catechism*, with the additional emphasis on correction. The *Roman Catechism* says that civil punishments tend to "the preservation and security of human life ... by repressing outrage and violence."⁶³

The *Catechism* and the *Compendium* provide no reference for their statements about the primary end of punishment. Yet of the four quotations in the section on "Legitimate Defense," two are from the *Summa Theologiae*. More importantly, the *Catechism* reaffirms Thomas's view that punishment is directed primarily toward redressing disorder, and secondarily toward "the correction of the guilty party."⁶⁴ That is, an act is penal insofar as its object is to redress disorder produced by an offense. This is a general definition of punishment, applying alike to eternal and temporal penalties; therefore, paragraph 2266 goes on to specify civil punishment: "in addition to defending public order and protecting people's safety, [punishment] has a medicinal purpose: as far as possible, it must contribute to the correction of the guilty party." The text indicates that the correction of the wrongdoer is an additional purpose of punishment, distinct from the defense of public order. However, "protecting people's safety" is here presented along with "defending public order," whereas the preceding sentence simply gave "redressing the disorder introduced by the offense" as the primary purpose of punishment. The

⁶² English trans. Libreria Editrice Vaticana (Washington, D.C.: U.S. Conference of Catholic Bishops, 2006), n. 468.

⁶³ Fifth Commandment (n. 280).

⁶⁴ C.C.C. 2266.

Catechism does not make the protection of public safety a medicinal end of punishment,⁶⁵ like the reform of the wrongdoer, but includes it with the primary end of redressing disorder. The most reasonable interpretation is that “protecting people’s safety” is a part of, or the specification of, “defending public order.”

As we have seen, Thomas describes different levels of order: the order within a man’s soul, the civil order, the order of the universe as a whole. The phrase “protecting people’s safety,” specifies how *civil* punishment goes about redressing disorder. Unlike eternal punishment, it does not redress disorder perfectly. It does not give to each exactly what his acts deserve in respect to the order of the universe. Civil punishment redresses only civil disorder. Thomas observes that only eternal punishments are retributive in an absolute sense. Man’s punishments, including those of the state, “are sought, not for their own sake, because this is not the final time of retribution, but in their character of medicine, conducing either to the amendment of the sinner, or to the good of the commonwealth whose calm is ensured by the punishment of evil-doers.”⁶⁶

Paragraph 2267 brings all three of the above-mentioned characteristics of punishment to bear on its treatment of the death penalty. Paragraph 2267 begins by “[a]ssuming that the guilty party’s identity and responsibility have been fully determined.” The presence of public authority is mentioned in the second sentence, as is the common good:

⁶⁵ If it did, the sentence should read: *Punishment then, in addition to defending public order, has the medicinal purposes: protecting people’s safety and contributing to the correction of the guilty party.*

⁶⁶ *S.T.* II-II, q. 68, a. 1. The punishments of eternity are not sought for their own sake, either (see *S.T.* I-II, q. 19, a. 10, ad 2), but they are sought for the order of which they are a part, rather than for some extrinsic end.

If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity to the dignity of the human person.

Thus, all the elements that are characteristic of punishment in the *Catechism's* treatment are also present in its treatment of CP, implying that CP is being considered precisely as a punishment.

What about the *Catechism's* assertion (2267) that CP is licit if it is “the only possible way of effectively defending human lives against the unjust aggressor”? Does this indicate a rejection of the public order justification in the case of CP? This simply does not follow, especially when we consider that paragraph 2266 identified protecting people's safety as at least one part of defending public order.

The *Catechism* does imply that it is illicit for public officials to use the death penalty simply as retribution. They must consider whether a lethal punishment is necessary to defend human lives. If necessary—that is, if the available non-lethal punishments would be insufficient to defend human lives—then public authority may rightly choose CP. This kind of decision-making is obviously subject to many contingencies. Non-lethal punishments may turn out to be ineffective in cases when they were thought to be adequate, and lethal punishments may be thought necessary in cases when they are not. The possibility of error does not make it impossible to make a moral judgment. Practical knowledge, since it depends on particulars, not all of which can be known by the human agent, does not have the same certainty that speculative knowledge has, but it is nonetheless knowledge.

Brugger is mistaken in thinking that because the *Catechism* stresses the secondary or specific justification of the death penalty, it rejects the primary or general justification for punishment. The *Catechism*'s reasoning on CP is similar to the reasoning used to justify private self-defense in its insistence that lethal force is a last resort ("the only possible way of defending human lives"). But while private self-defense only presupposes that the aggressor represents a serious and immediate threat, CP presupposes not only that the aggressor represents a threat, but that the aggressor has already committed some offense: "Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty."⁶⁷ The *Catechism* does not deny that the death penalty may be used as punishment, but it adds that this punishment ought to be used only when necessary for the defense of society.

The idea of CP as a kind of defense is not new; the tradition also sees CP as a way in which society defends itself from threats and preserves innocent human lives. For what is meant by defense of society, if not something very like the "preservation and security of human life" and "freedom from external disorders"?⁶⁸ What is new is the judgment that at the present time, situations in which CP is necessary to defense of society are rare. The *Catechism* does not deny the retributive justification for CP, but it emphasizes the secondary justification, defense of society.

So both Aquinas and the *Catechism* make retribution a necessary, but not a sufficient condition for the just use of CP. Punishment presupposes guilt (the primary,

⁶⁷ C.C.C. 2267.

⁶⁸ *Roman Catechism*, 280; S.C.G. III, c. 37, n. 7.

retributive justification), he says, but the punishments of this life are further characterized by their medicinal quality. Not only must the criminal be guilty of a grave crime, he must present a grave threat to the common good, in order for CP to be justified. Because this world is not the stage for perfect retribution,⁶⁹ the death penalty is only used to remove those offenders who are a grave threat to the civil community: “human justice ... puts to death those who are dangerous to others, while it allows time for repentance to those who sin without grievously harming others.”⁷⁰

The second part of Brugger’s development of doctrine position is the association of CP with the principle of double effect. In his treatment of the *Catechism*, Brugger suggests that the death penalty may be justified not as a punishment, but as social self-defense:

Because the text [of the *Catechism*] strictly ties its analysis to a model of *self-defense* against the wider conceptual backdrop of *double-effect* reasoning, it is reasonable to conclude (1) that the act referred to in the text as *poena mortis* is not, precisely speaking, an act of punishment, but an act of collective self-defense by the community against a dangerous internal aggressor, and (2) that capital punishment as well as all acts of legitimate killing should be limited by conditions traditionally used to limit lawful killing in private self-defense.⁷¹

The application of double effect to CP is problematic for two reasons: it is philosophically untenable, and it is not supported by the text of the *Catechism*.

Brugger stretches the idea of double effect beyond its reasonable application. He maintains that sometimes CP describes an act of collective self-defense, which does not

⁶⁹ *S.T. II-II*, q. 68, a. 1: “Now the punishments of this life are sought, not for their own sake, because this is not the final time of retribution, but in their character of medicine, conducing either to the amendment of the sinner, or to the good of the commonwealth whose calm is ensured by the punishment of evil-doers.”

⁷⁰ *S.T. II-II*, q. 64, a. 2, ad 2.

⁷¹ Brugger, *CP and the RC Moral Tradition*, 12. See also Brugger’s “Catholic Moral Teaching and the Problem of Capital Punishment,” 41-67, 43.

include death as an intention. This is not a reasonable use of double-effect. The source of double-effect reasoning is the article on self-defense in *S.T.* II-II, q. 64. Thomas argues there that killing in self-defense is sometimes licit. He gives the principle, “Moral acts receive their species according to what is intended, but not from that which is *praeter intentionem*.”⁷² Death may result from an act of proportional self-defense by a private person, and death in this case is *praeter intentionem*. Since he has said that what is *praeter intentionem* does not give species to the moral act, it follows that in an act of private self-defense, the killing of the attacker does not determine the moral species. In the same article, he concludes, “A man may not lawfully intend to kill a man in order to defend himself, except for him who has public authority, who, intending to kill a man in self-defense, refers this to the public good.”⁷³ While a private person may not intend to kill a man, he may use potentially lethal forms of self-defense. As one recent commentator puts it, “he may knowingly risk the assailant’s life by defending himself with such force that the aggressor’s death, if it results, would be one of the foreseeable characteristic consequences of the self-defensive act.”⁷⁴

Yet Thomas quite definitely considers those with public authority to be a different case. In a previous article, he states the reason for this exception:

⁷² *S.T.* II-II, q. 64, a. 7: “Morales autem actus recipiunt speciem secundum id quod intenditur, non autem ab eo quod est praeter intentionem, cum sit per accidens, ut ex supradictis patet.” See also *S.T.* II-II, q. 34, a. 3, on the sin of scandal: “The scandal is accidental when it is beside the agent’s intention, as when a man does not intend, by his inordinate deed or word, to occasion another’s spiritual downfall, but merely to satisfy his own will. On such a case even active scandal is not a special sin, because a species is not constituted by that which is accidental.”

⁷³ *Ibid.*, c.: “Illicitum est quod homo intendat occidere hominem ut seipsum defendat, nisi ei qui habet publicam auctoritatem, qui, intendens hominem occidere ad sui defensionem, refert hoc ad publicum bonum.”

⁷⁴ Thomas A. Cavanaugh, “Aquinas’s Account of Double Effect,” *The Thomist* 61 (1997).

It is lawful for any private individual to do anything for the common good, provided it harm nobody: but if it be harmful to some other, it cannot be done, except by virtue of the judgment of the person to whom it pertains to decide what is to be taken from the parts for the welfare of the whole.⁷⁵

Those like Brugger who fail to distinguish between what is morally required of and permitted to a private person, and what is morally required of and permitted to public authority, must reject all intentional killing as specifically evil. For Thomas, on the other hand, the presence of public authority makes one act of self-defense specifically different than the other. It is not that it is good for the public official to do something that is evil per se, which would be contradictory, since an act that is evil per se is by definition an act that is never good. Rather, the act of intentional killing is insufficiently specified until we know who is killing and who is killed. Thomas claims that the act of intentionally killing a wrongdoer for the common good is specifically good, but it is only possible to one with authority for the common good. This does not mean that the public official intends the offender's death for its own sake, an intention that Thomas condemns.⁷⁶ This in fact would make it an act of hatred, and therefore an evil act.

The principle that one with public authority may kill for the common good is operative also in the case of CP:

It is lawful to kill an evildoer in so far as it is directed to the welfare of the whole community, so that it belongs to him alone who has charge of the community's welfare. Thus it belongs to a physician to cut off a decayed limb, when he has been entrusted with the care of the health of the whole body. Now the care of the common good is entrusted to persons of rank having public authority: wherefore they alone, and not private individuals, can lawfully put evildoers to death.⁷⁷

⁷⁵ *S.T.* II-II, q. 64, a. 3, ad 3.

⁷⁶ See, for example, *S.T.* II-II, q. 43, a. 7, ad 1: "In the infliction of punishment it is not the punishment itself that is the end in view, but its medicinal properties in checking sin; wherefore punishment partakes of the nature of justice, in so far as it checks sin."

⁷⁷ *S.T.* II-II, q. 64, a. 3.

Again, the point is not made in terms of exceptions to a rule (killing is normally evil, but not in cases X, Y, and Z), but in terms of the power to undertake a certain kind of action for the good of the community. It is not possible here to explore the Thomistic conception of authority, but we must note that in his view all human authority is a participation in divine authority. The source of the power to execute, and in fact the source of all authority of one man over another, is God.

The classic reference used to defend the power to execute is Genesis 9:6, “Whoever sheds the blood of man, by man shall his blood be shed.” Brugger interprets this passage to mean “the death and resurrection of Christ has effected a change in the moral order that eliminates the need for the spilling of blood.”⁷⁸ Here Brugger seems to conflate the spilling of the blood of beasts in sacrifice with the spilling of human blood as punishment. While the sacrifice of Christ has made the former unnecessary, it has not eliminated the need for punishment. So the question remains as to whether the authority to punish with death has been given to men. Brugger acknowledges that he has not answered the question of authority:

But the passage in Genesis 9:6 seems to affirm that human agents have a mediating role in the justice of God which includes as a consequence, in some cases, the infliction of death. The passage seems to me to warrant at least a provisional conclusion that the biblical author *intended* to refer to a role belonging to humans as such by reason of the relationship of human authority to divine authority. A closer analysis of this text would require biblical exegesis beyond the scope of the present work, and therefore, the problem it poses to the interpretation of the *Catechism* set forth in chapter 1 will be left standing.⁷⁹

⁷⁸ Brugger, *CP and the RC Moral Tradition*, 73.

⁷⁹ Brugger, *CP and the RC Moral Tradition*, 73.

If Scripture affirms that human authority shares in divine authority, then there is reason for claiming that those in authority may intend and do things that private persons may not. If God, who has authority over life and death, allows men to share in this authority, then human authorities have the power to punish with death. Since he leaves this question standing, Brugger fails to provide reason for affirming the contrary.

D Second Objection: CP is Incompatible with the Common Good as Understood in Catholic Social Teaching

A second objection based on *E.V.* and the *Catechism* touches on the notion of the common good. One's view of the common good affects how one views the legitimacy of CP. This is true whether one's view of the common good is determined by philosophical or by theological considerations. The theologically-based common good objection begins with the assumption that recent Church documents embrace an instrumentalist view of the common good. A major source for this assumption is the often-cited passage in *Gaudium et spes* (G.S.):

Because of the closer bonds of human interdependence and their spread over the whole world, we are today witnessing a widening of the role of the common good, which is the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily.⁸⁰

This passage seems to say that the common good is merely a means to the fulfillment of individuals and groups, an instrumental good only. This is difficult to reconcile with Thomas's assertion of the superiority of the common good to the individual, private good, which is essential to his justification of CP. In *E.V.*, John Paul II seems to support

⁸⁰ G.S. n. 26.

an instrumentalist view of the common good, when he speaks of the common good as serving the rights and duties of individuals, rather than individuals serving the common good:

Disregard for the right to life, precisely because it leads to the killing of the person *whom society exists to serve*, is what most directly conflicts with the possibility of achieving the common good.⁸¹

If the common good is merely a means to the fulfillment of individuals and groups, as this implies, then it seems that the good of individuals is superior to the common good.

Response to the Second Objection

In response to this objection, we must ask what *G.S.* means by the “conditions of social life,” and what constitutes the fulfillment of individuals and social groups which these conditions make possible. If these conditions are not only means, but genuine, though imperfect, ends, and if, moreover, human fulfillment means eternal beatitude, then the objection does not hold. If, on the other hand, the conditions are not ends in themselves, but only means, and if they are means to a temporal end or ends, then the objection does hold. I will argue that the view of the common good articulated by John Paul, which draws on *G.S.* and on the social encyclicals of his predecessors, has more in common with the Thomistic view than with a purely instrumentalist view. Most importantly, John Paul is committed to a Thomistic view of human nature. I will limit my comments to the encyclicals of John Paul, since his pontificate produced the statements on CP with which we are concerned.

⁸¹ *E.V.* n. 72 (emphasis mine).

The common good, John Paul says in *E.V.*, is the end that regulates political life.⁸² The fact that he calls the common good an *end* already indicates that he is talking about something more than a purely instrumental good. While affirming the positive features of a democratic political arrangement, John Paul warns that democracy must be based on the natural law, and not on a philosophy of materialism or individualism. A skeptical view of political life, one that sees democracy as a “mere mechanism for regulating different and opposing interests on a purely empirical basis,” is an insufficient foundation for a stable political order.⁸³ While civil law does regulate private interests, its real purpose “is to guarantee an ordered social coexistence in true justice, so that all may ‘lead a quiet and peaceable life, godly and respectful in every way’ (1 Tim 2:2).”⁸⁴ Thus, civil law must conform with moral law—and here John Paul quotes Thomas: human law is only law “insofar as it derives from the natural law.”⁸⁵ The pope then applies this Thomistic insight to the current political situation in many countries. He says that laws allowing and promoting abortion and euthanasia are not only opposed to individual goods, but to the common good, and that therefore they are not true laws; laws that so blatantly disregard the “right to life” are “what most directly conflicts with the possibility of achieving the common good.”⁸⁶

⁸² *E.V.* 70: “But the value of democracy stands or falls with the values which it embodies and promotes. Of course, values such as the dignity of every human person, respect for inviolable and inalienable human rights, and the adoption of the ‘common good’ as the end and criterion regulating political life are certainly fundamental and not to be ignored.”

⁸³ *E.V.* 70.

⁸⁴ *Ibid.*, 71.

⁸⁵ *S.T.* I-II, q. 95, a. 2., quoted in *E.V.* 72.

⁸⁶ *Ibid.*, 72.

In another part of *E. V.*, John Paul comments on the particular role of civil leaders in serving the common good.⁸⁷ But the obligation to serve the common good is not reserved to civil leaders alone; all are called to practice the virtue of “solidarity,” which he defines as “a firm and persevering determination to commit oneself to the common good.”⁸⁸ This definition calls to mind the Thomistic-Aristotelian virtue of legal justice, the virtue that “directs the acts of all the virtues to the common good.”⁸⁹ Both solidarity and legal justice are about the individual’s orientation to the common good.

In these points, John Paul reflects the classical view of the common good: the common good is the end of political life, the particular domain of those in civil authority, and the end of the virtue by which man is directed in relation to the whole community. In *E. V.*, however, devotion to the common good is placed side by side with affirmation of inalienable human rights, a decidedly modern notion. It is generally recognized that the notion of “human rights” has its origin in Enlightenment thought, and not in Aquinas. Still, the papal authors do not rely on the Enlightenment foundation for those rights. Rather, they say that human rights are founded in natural law, and in the image of God in man. The merits of reasoning from human rights are much debated. But since those rights require illumination from another source, and since the papal authors provide such a source, it is only fair to make use of it.

The conjunction of the ideas of rights and the common good raises some questions. If the protection of individual rights is the aim of political society, where does

⁸⁷ *E. V.* 90.

⁸⁸ *E. V.* 93, quoting John Paul II, Encyclical Letter *Sollicitudo Rei Socialis* (30 December 1987).

⁸⁹ *S.T.* II-II, q. 58, a. 6.

that leave the common good? If, on the other hand, political society must aim at the common good, does this not make individual rights subordinate to the common good? John Paul evidently does not see natural rights as incompatible with the common good. Drawing on John XXIII's *Pacem in terris*, John Paul says that the best way for government to safeguard the common good is by guaranteeing the rights of individuals and facilitating the exercise of their duties.⁹⁰ In particular, "it is impossible to further the common good without acknowledging and defending the right to life, upon which all the other inalienable rights of individuals are founded and from which they develop."⁹¹ True democracy and true peace require the defense of this right to life.⁹²

Despite his prominent use of rights language in *E.V.* and elsewhere, John Paul maintains that the common good is the end of political life. He connects the common good with protecting individual rights, but does not reduce the common good to the protection of individual rights. In *E.V.*, John Paul lists a wide range of practices that "poison human society" rather than promoting the common good, from abortion to poor working conditions.⁹³ To combat these evils is to pursue the common good. John Paul is concerned with doing much more than establishing a written set of rights. His support for political involvement in issues of employment, poverty, etc. shows that his notion of the political common good includes considerably more than a liberal view based solely on universal rights.

⁹⁰ *E.V.* 71.

⁹¹ *Ibid.*, 101.

⁹² *Ibid.* In *Centesimus Annus*, John Paul says that the common good "is not simply the sum total of particular interests; rather it involves an assessment and integration of those interest on the basis of a balanced hierarchy of values; ultimately it demands a correct understanding of the dignity and rights of the person." *C.A.* 47.

⁹³ *E.V.* 3.

All this is not to say that there is no difference between the classical view of political life and the view expressed or implied in the Church's social encyclicals. The emphasis on human dignity is noteworthy. This difference is addressed in the reply to the next objection. Although *Evangelium Vitae* at times seems to endorse a purely instrumentalist view of the common good, such a view is incompatible with other assertions made there and in other writings of John Paul II.

For both John Paul II and Thomas Aquinas, the death penalty is licit insofar as it is necessary for the common good. But where Aquinas presumably thought the penalty necessary on a regular basis, John Paul did not. In *E.V.*, he makes the practical determination that the common good, here and now, is better served by bloodless means of punishment. John Paul assumes that certain practical conditions obtain, practical conditions that presumably did not obtain in the thirteenth century.⁹⁴ These conditions are first, the availability of another equitable punishment for grave crimes; second, the effectiveness of this penalty in protecting the common good; and finally, the conformity of this alternative with custom, such that the elimination of the death penalty will not corrupt the people's respect for law.

The idea that CP ought to be limited to cases of necessity was already present in Aquinas, who says that a society ought to use this penalty against those who are dangerous to others, "while it allows time for repentance to those who sin without grievously harming others."⁹⁵ *E.V.* states this requirement in stronger terms, referring to

⁹⁴ It may be that these conditions obtain in some parts of the world and not in others. John Paul does not answer this practical question in the encyclical.

⁹⁵ *S.T.* II-II, q. 64, a. 2, ad 2.

cases of “absolute necessity.” In practice, John Paul II consistently pleaded against the use of the death penalty in particular cases. Aquinas presumably would have identified many more circumstances in which it was necessary to resort to CP. His own analogy of amputation might be used to illustrate this difference. A 21st century doctor and a 13th century doctor might both agree that amputation is a legitimate way of practicing medicine, but only to be used as a last resort. But in practice, the 13th century doctor would probably use the operation more frequently than the 21st century doctor.

There is also the question of custom. Change in custom, of course, is a difficult thing to gauge, and I will not attempt to evaluate the exact state of public opinion of CP in contemporary societies. Still, it is obvious that modern sensibilities about CP are quite different from those of the 13th century. If capital punishment had not been both a customary and quite common punishment in Thomas’s time, q. 64 of the *Secunda Secundae* might have read quite differently. If Thomas had lived in a society in which CP was not part of the law, and in which crime was suppressed in other ways, the principles on which his view is based would not have forced him to advocate a change. On the contrary, his presumption is against changing the law. Or if he had lived in a society in which the written laws prescribed death for certain crimes, but the punishment was not customarily used, it is entirely plausible to think that Thomas would have advocated a change in the written law, on the principle that “custom has the force of a law, abolishes law, and is the interpreter of law” would favor changing the written law.⁹⁶

⁹⁶ S.T. I-II, q. 97 a. 3.

E Third Objection: CP Violates Human Dignity

Another objection to Aquinas's account focuses on the notion of human dignity. The objection that intrinsic human dignity is incompatible with the practice of CP has been made in purely secular terms, but it is more commonly a theological objection, founded on the creation of man in the image of God. At the end of an essay comparing Leo XIII's *Rerum novarum* to John Paul II's *Centesimus annus*,⁹⁷ Ernest Fortin wonders what Pope Leo would have thought of

John Paul II's unprecedented insistence on the more or less Kantian notion of the "dignity" that is said to accrue to the human being, not because of any actual conformity with the moral law, but for no other reason than that he is an "autonomous subject of moral decision" (no. 13). The more usual view, which Kant was rejecting, is that one's dignity as a rational and free being is contingent on the fulfillment of prior duties. That dignity could be forfeited and was so forfeited by the criminal who had no respect for and no desire to abide by the moral law. One's goodness or dignity was not something given once and for all; it was meant to be achieved.⁹⁸

Father Fortin might have wondered the same thing about *Evangelium Vitae*, which makes frequent reference to the idea of human dignity.⁹⁹ *E.V.* uses dignity as a reason for the goodness of human life (34), in its defense of the Fifth Commandment (53), as a reason for the wrongness of abortion (60-61) and other acts, as providing the end of civil society

⁹⁷ *Rerum Novarum* (1891) is recognized as the Church's first social encyclical. Since *Rerum Novarum*, eight major social encyclicals have been promulgated: one by Pius XI (*Quadragesimo Anno*), two by John XXIII (*Mater et Magistra* and *Pacem in Terris*), two by Paul VI (*Octogesima Adveniens* and *Populorum Progressio*), and three by John Paul II (*Laborem Exercens*, *Sollicitudo Rei Socialis*, and *Centesimus Annus*). *Evangelium Vitae* is not considered a social encyclical (*Deus Caritas Est* 27), as it is not concerned with social movements *per se*. Yet it has in common with the social encyclicals a focus on human dignity and social concerns.

⁹⁸ "From *Rerum Novarum* to *Centesimus Annus*: Continuity or Discontinuity?" in Ernest Fortin: *Collected Essays*, vol. 3, 229.

⁹⁹ The theme of the dignity of human life has also been taken up in some of the secular literature on CP. For some examples, see Robert Hoyler, "Capital Punishment and the Sanctity of Life," *Contemporary Currents* 34:4 (December 1994): 485-497. Hoyler points out that such arguments were once more common, but now are more likely to be found in explicitly religious contexts (485-486).

(72), and as a sign of God's glory (84). John Paul also uses the notion of human dignity in his discussion of capital punishment, saying that bloodless punishments "are more in conformity to the dignity of the human person" than the death penalty (n. 56). He does not explain why capital punishment fails to conform to the dignity of the human person. Elsewhere in the encyclical, the Pope says that every person, even the worst criminal, maintains his human dignity. One might argue on the basis of n. 56 that to kill an evildoer for the good of other men is to disregard the evildoer's dignity.¹⁰⁰ But one ought never to disregard human dignity. Therefore, one ought never to kill an evildoer for the good of others.

Response to the Third Objection

My reply to this objection will focus on the different senses of dignity in the *Summa* and in *Evangelium Vitae*. In examining these different senses, we find that the notion of human dignity is an analogical notion. The objection, however, treats it as a purely equivocal notion. *E.V.* does make the connection between forgoing the death penalty and respecting human dignity. It does not justify an absolute moral prohibition of capital punishment on this basis. We must not neglect the fact that *E.V.* does allow for the use of CP in rare cases. This means that *if* CP is found to be a violation of human dignity in some sense, then the teaching does not absolutely prohibit the violation of human dignity.

¹⁰⁰ I use "disregard," but one could substitute offend, disrespect, violate, etc. *E.V.* does not give us any guidance on this point, because it frames the point in positive terms ("more in conformity"). I think this is one reason to question whether one can attribute this argument to *E.V.*, as I will show below.

It is worth noting at the start that the concept of human dignity has also been used as an argument *for* capital punishment. Kant's understanding of respecting human dignity by never treating a man merely as a means leads him to conclude that a strict equality must obtain between crime and punishment. In "The Science of Right," he argues that punishment cannot be used merely as a means to some other good, "but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*."¹⁰¹ Specific punishments should be determined by "the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other."¹⁰²

But whoever has committed murder, must *die*. There is, in this case, no juridical substitute or surrogate, that can be given or taken for the satisfaction of justice. There is no *likeness* or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal.¹⁰³

To mitigate the punishment of death for the crime of murder would be to treat the criminal as a means to some social good; for example, to preserve his life for the labor that could be extracted from him.¹⁰⁴ This does not mean that a punishment cannot serve social goods, but that it is not justified by serving those goods.¹⁰⁵ Kant admits that in some circumstances, it is not possible to punish with exact likeness to the crime: if, for

¹⁰¹ Immanuel Kant, "The Science of Right," translated by W. Hastie, in *Great Books of the Western World*, vol. 42: Kant (Chicago: Encyclopædia Britannica, 1952), 446.

¹⁰² Kant, "The Science of Right," 447.

¹⁰³ Kant, "The Science of Right," 447.

¹⁰⁴ Kant, "The Science of Right," 447.

¹⁰⁵ In one of his ethical lectures, Kant distinguishes between moral and civil punishments. Civil punishments are deterrent, while moral punishments are the true "penal desert" of an offender: "But apart from this actual [civil] punishment, every transgression has a penal desert for the reason that it has been committed. Punishment which must follow from the action by such a necessity is moral and therefore a *poena vindictiva*." "Reward and Punishment," *Lectures on Ethics*, trans. Louis Infield (Indianapolis: Hackett, 1980): 52-57, 56.

example, the number of those who participated in a murder or murders is so great that their execution would endanger the existence of the state, the sovereign may preserve their lives and inflict some other penalty.¹⁰⁶

In any case, Kant does not see human dignity as an obstacle to using the death penalty. Even those who do not think, as he does, that CP is a necessary punishment for certain crimes, may see no contradiction between this punishment and human dignity. Philosopher Janet Smith describes this position in an article called “Rethinking Capital Punishment,”

Many believe that, at bottom, the teaching that states have the right to utilize capital punishment for certain crimes seems altogether compatible with a culture of life and a respect for human dignity, for it indicates the heinousness of certain crimes against life and human dignity. It even respects the dignity of the perpetrator of the crime, for we acknowledge his right to make his free choices, and to accept the proper consequences.¹⁰⁷

In contrast to Kant and to contemporary critics like Brugger and Grisez, Aquinas does not think that human dignity either forbids or necessitates the death penalty.

Aquinas never uses the expression “human dignity”; he speaks instead of the dignity of human nature. Even this concept he uses in a peripheral way, never addressing the notion directly, much less using it as an arguing point. John Paul says that no man, however evil his acts, loses his human dignity. Thomas does not think it possible for any man to lose his human nature. On the other hand, he does think it possible for a man to depart from the dignity of his nature through sinning.¹⁰⁸ This seems to indicate that for Thomas, as Ernest Fortin puts it, “one’s dignity as a rational and free being is contingent

¹⁰⁶ Kant, “The Science of Right,” 448.

¹⁰⁷ Janet Smith, 4.

¹⁰⁸ *S.T.* II-II, q. 64, a. 2, ad 2.

on the fulfillment of prior duties.”¹⁰⁹ In one sense, this is true. But Thomas also implies that there is a certain dignity that belongs to human nature per se, insofar as man is an intellectual creature, made in the image of God. In the *Prima Pars*, he considers the image of God in man (he uses the word *dignitas* once in this question—see a. 2, ad 2, cited below). He makes a distinction between likeness and image: not every likeness is an image, but an image is a likeness in species. Therefore the image of God is not in irrational creatures, even though they have some likeness to God.¹¹⁰ Rational creatures, on the other hand, are in the divine image, because they have a specific likeness to God, on account of their intellects and wills:

Not every likeness, not even what is copied from something else, is sufficient to make an image ... But the nature of an image requires likeness in species ... Now it is manifest that specific likeness follows the ultimate difference. But some things are like to God first and most commonly because they exist; secondly, because they live; and thirdly because they know or understand; and these last, as Augustine says (q. 83, q. 51) “approach so near to God in likeness, that among all creatures nothing comes nearer to Him.” It is clear, therefore, that intellectual creatures alone, properly speaking, are made to God’s image.¹¹¹

The second objection says that non-rational creatures are made to the image of God, as illustrated by Dionysius when he compares the sun’s ray to the divine goodness. Thomas responds, “Dionysius compares the solar ray to Divine goodness, as regards its causality; not as regards *its natural dignity which is involved in the idea of an image*.”¹¹² An image shares somewhat in the dignity of its exemplar; yet image does not imply equality.¹¹³ Since an image may be an imperfect likeness of the exemplar, it may also be less in

¹⁰⁹ Fortin, 229.

¹¹⁰ *S.T. I*, q. 93, a. 2.

¹¹¹ *S.T. I*, q. 93, a. 2.

¹¹² *Ibid.*, ad 2 (emphasis mine).

¹¹³ *S.T. I*, q. 93, a. 1.

dignity than its exemplar. The more perfect the image, the more it approaches the dignity of the exemplar, and a perfect image is equal in dignity to its exemplar. And the more it departs from the image of the exemplar, the less it has of the dignity of the exemplar. Yet as long as something can still be called an image of the exemplar, it has something of the dignity of that exemplar.

In a. 4 of this question, Thomas shows that the divine image is present in varying degrees in different men. Man imitates God by being an intellectual being, and he imitates God more perfectly the more he imitates God's own intellectual activity, which consists in knowing and loving God. For the mind imitates God, not by knowing just anything, but by knowing God.¹¹⁴ Thus, the first way that man is an image of God is in his "natural aptitude for understanding and loving God," and since "this aptitude consists in the very nature of the mind," it is common to all men.¹¹⁵ Second, man is an image of God insofar as he "actually and habitually knows and loves God, though imperfectly; and this image consists in the conformity of grace."¹¹⁶ As there are varying degrees of actual grace and of knowledge and love of God among men on earth,¹¹⁷ so there must be as many variations in degree of likeness to God within this second category. Finally, man is in the image of God "inasmuch as man knows and loves God perfectly; and this image consists in the likeness of glory."¹¹⁸ Since among the blessed, there are also varying degrees of love of God, this category too must have degrees. Thomas concludes, "The

¹¹⁴ *S.T. I*, q. 93, a. 8.

¹¹⁵ *S.T. I*, q. 93, a. 4.

¹¹⁶ *Ibid.*

¹¹⁷ *S.T. I-II*, q. 113, a. 4: "As regards the subject, grace can receive more or less, inasmuch as one may be more perfectly enlightened than another."

¹¹⁸ *S.T. I*, q. 93, a. 4.

first [likeness] is found in all men, the second only in the just, the third only in the blessed.”¹¹⁹

Since the first way in which man is an image of God is simply in being an intellectual creature, with the capacity to know and love his Creator, it follows that unless man ceases to be man, he cannot cease to be the image of God in some sense. Therefore, even the evildoer is an image of God:

[It] is natural that the mind, in order to understand God, can make use of reason, in which sense we have already said that *the image of God abides ever in the soul*; “whether this image of God be so obsolete,” as it were clouded, “as almost to amount to nothing,” as in those who have not the use of reason; “or obscured and disfigured,” as in sinners; or “clear and beautiful,” as in the just; as Augustine says (*De Trin.* XIV.6).¹²⁰

If man’s dignity is derived from his being in the image of God (the “natural dignity which is involved in the idea of an image”), and all men are such an image, but to varying degrees, then all men share in the dignity of that image, but again, to varying degrees.

The idea that dignity exists in varying degrees is affirmed in another way, where Aquinas speaks of man’s loss of dignity as the result of original sin. Here, one of the punishments for original sin is the loss of the dignity that belonged to the state of original justice, in which man’s body was entirely subject to his reason: “But since, by the just sentence of God, man is destitute of original justice, and his reason bereft of its vigor, this impulse of sensuality, whereby he is led, in so far as it is *a penalty following from the Divine law depriving man of his proper dignity*, has the nature of a law.”¹²¹ The present state of man represents a fall from the dignity he once possessed, a dignity that Thomas

¹¹⁹ *S.T.* I, q. 93, a. 4.

¹²⁰ *S.T.* I, q. 93, a. 4, ad 3. Emphasis mine.

¹²¹ *S.T.* I-II, q. 91, a. 6 (emphasis mine).

explains as a divine gift—not part of man’s nature, but proper to it. As original justice was a divine gift, so sanctifying grace is a divine gift. As man lost the dignity of the first gift, he can lose the dignity of the second. Through serious sin, man loses the dignity of the gifts that perfect his nature. On the other hand, nothing a man does can erase his capacity to know and love God, which is in him by nature. In this sense, man’s dignity is never lost.

Evangelium Vitae also uses the notion of dignity in different senses. Despite the difference in vocabulary, the different senses used in *E.V.* are basically the same as the three senses used by Thomas. The first, preponderant, sense of human dignity in *E.V.*, is the human dignity ascribed to man by virtue of his being made in the image of God. For example, commenting on Genesis 9:5, John Paul says, “The biblical text is concerned to emphasize how the sacredness of life has its foundation in God and in his creative activity: ‘For God made man in his own image’ (Gn 9:6).”¹²² In Chapter 3, he declares that “to kill a human being, in whom the image of God is present, is a particularly serious sin.”¹²³ Man’s dignity and the “sacredness” of his life are clearly related to man’s being in the image of God. In this sense, human dignity can never be lost (“Not even a murderer loses his personal dignity, and God himself pledges to guarantee this”).¹²⁴ When we consider the theme of *E.V.*, it is not surprising that John Paul focuses on the first sense of dignity, the dignity common to all men. In this encyclical, one of his two main targets is abortion, which denies this equal and basic dignity to the unborn. Against

¹²² *E.V.* 39. In the encyclical, dignity and sanctity seem to be used interchangeably. I will treat them as equivalent expressions. See the end of this section for a note on dignity and sanctity.

¹²³ *E.V.* 55.

¹²⁴ *E.V.* 9.

this error, the Pope affirms a dignity that is common to all men, made in the image of God.

John Paul also refers to the sanctity or sacredness of human life.¹²⁵ He often uses this concept interchangeably with human dignity, and rhetorically, it seems to serve the same purpose; it is given as a ground for man's obligation to treat his fellow men in certain ways: not to kill, to protect the weak, to pay fair wages, etc. In using the word sacred (i.e., holy, set apart) to refer to all human life, the encyclical emphasizes the difference between human and other animal life. Man is not simply alive; his life has a quality that sets it apart from all other living beings. What sets man apart from other living things is his intellectual nature. Thus the sanctity of human nature seems to relate primarily to this first sense of human dignity, the dignity that man has by virtue of his rational nature.

While on the one hand, *E.V.* says that human dignity is equally in every person and cannot be lost, on the other hand, it speaks of threats to and attacks on human dignity, and the need to preserve and defend human dignity.¹²⁶ These points only make sense if one can lose dignity, in some way. This second sense of human dignity is the dignity that comes from acting in accord with the moral law (the more traditional sense referred to by Fr. Fortin). In this sense, one loses human dignity when one violates God's Commandments, "a gift of grace entrusted to man always and solely for his good, *for the preservation of his personal dignity and the pursuit of his happiness.*"¹²⁷ Grace increases

¹²⁵ See *E.V.* 22, 25, and 53.

¹²⁶ See especially *E.V.* 3-4.

¹²⁷ *Ibid.*, 52. Emphasis mine.

human dignity: “[The] Gospel exceeds every human expectation and reveals the sublime heights to which the dignity of the human person is raised through grace.”¹²⁸ Practices that violate the moral law, on the other hand, defile and cheapen human dignity.¹²⁹

But a person can also lose human dignity, not by what he does, but by what is done to him. This third sense has to do with the external aspects of human life: bodily necessities, work, living conditions, civic participation, etc. This sense of dignity is derived from the second: it pertains to the conditions necessary for achieving the second form of dignity. John Paul calls attention to this sense of dignity it when he quotes

Gaudium et spes:

Whatever insults human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children; as well as disgraceful working conditions, where people are treated as mere instruments of gain rather than as free and responsible persons; all these things and others like them are infamies indeed.¹³⁰

In the third sense, a person possesses human dignity when he has the conditions in which he can live in accord with his dignity in the second sense (i.e., in which he can live well).

This sense of dignity is more often encountered in John Paul’s social encyclicals. In *Sollicitudo rei socialis*, for example, he says that what is at stake in the problems of poverty and underdevelopment “is the dignity of the human person, whose defense and promotion have been entrusted to us by the Creator.”¹³¹ He speaks of the responsibility of

¹²⁸ Ibid., 80. See also 32: “By faith in Jesus, ‘the Author of life’ (Acts 3:15), life which lies abandoned and cries out for help *regains self-esteem and full dignity*” (emphasis mine).

¹²⁹ E.g., *E.V.* 98: “Those involved in the mass media ... should also present the positive values of sexuality and human love, and not insist on what defiles and cheapens human dignity.”

¹³⁰ *G.S.* 27, quoted in *E.V.* 3.

¹³¹ *Sollicitudo Rei Socialis* 47. See also n. 41: “Following the example of my predecessors, I must repeat that whatever affects the dignity of individuals and peoples, such as authentic development, cannot be reduced to a ‘technical’ problem.”

individuals to work for economic and political goods, since “this is what is demanded by the present moment and above all by the very dignity of the human person, the indestructible image of God the Creator, which is identical in each one of us.”¹³² When he speaks of the dignity of work, by which man imitates the creative action of God, he speaks of something that may be harmed, for example when workers are treated unjustly (made to work in poor conditions, paid unjust wages, etc.).¹³³ In these cases, human dignity is something that requires certain external conditions, whose lack lessens but does not destroy human dignity.

Like St. Thomas, John Paul connects human dignity to human nature, for he grounds man’s dignity in his being formed (i.e., given a form or nature) in the image of God. Each sense of dignity used in *E.V.* characterizes an aspect of human nature. First, all men share in the same nature, which can in no way be taken away from them as long as they live. This nature, in the image of God (i.e., having intellect and will) is the source of the first sense of dignity. In this sense, a human person can never lose his dignity, because his dignity comes from being human. However, if nature is also understood in the sense of end, as Aquinas understands it, then one man may come closer to this end than another. This is the sense of the second kind of dignity. In this sense, we may say that the virtuous man is more fully human because he is more perfected as a man. The perfection of nature is the source of the second sense of dignity, which is increased by man’s good use of intellect and will. Finally, while external goods are not part of man’s

¹³² *Sollicitudo Rei Socialis* 47. See also *Centesimus Annus* 11, 22, and 34.

¹³³ For example, in *Laborem Exercens* 9, he says that there is a “justifiable anxiety” that work should not cause man to “experience a lowering of his own dignity.”

nature strictly speaking, they are necessary if he is to practice the virtues and fulfill his end as man. As Aristotle observes, sufficient material goods are a necessary condition for practicing virtue, and therefore for being perfected as a human being.¹³⁴ The external goods pertinent to nature are the source of the third sense of dignity; they create conditions in which men can more or less easily reach the fullness of human dignity.

The *Catechism* nicely summarizes the three senses of dignity and their source in human nature:

The dignity of the human person is rooted in his creation in the image and likeness of God; it is fulfilled in his vocation to divine beatitude. It is essential to a human being freely to direct himself to this fulfillment. By his deliberate actions, the human person does, or does not, conform to the good promised by God and attested by moral conscience. Human beings make their own contribution to their interior growth; they make their whole sentient and spiritual lives into means of this growth. With the help of grace they grow in virtue, avoid sin, and if they sin they entrust themselves as did the prodigal son to the mercy of our Father in heaven. In this way they attain to the perfection of charity.¹³⁵

The first sense of dignity is clearly indicated in the first clause: the root or foundation of human dignity is that man is made in the divine image and likeness.¹³⁶ The second sense, the dignity man acquires through his perfection as man, is indicated in what follows. The passage says that “the dignity of the human person ... is fulfilled in his vocation to divine beatitude,” and describes how the individual person must direct himself to this perfection.¹³⁷ The third sense is less evident, but we have a hint of it when we read that men “make their whole sentient and spiritual lives into means of this growth” toward

¹³⁴ *Ethics* I.8.

¹³⁵ C.C.C. 1700. Parenthetical references to specific article numbers omitted.

¹³⁶ See also C.C.C. 1702: “The divine image is present in every man.”

¹³⁷ See also C.C.C. 1704: “[Man] finds his perfection ‘in seeking and loving what is true and good’ [G.S. 15.2].”

perfection. That is, the means for growth in perfection are found not only in man's use of his spiritual faculties, but his whole "sentient life" (*vita sensibili*). While "deliberate actions" are the cause of progress towards the fulfillment of human dignity, external goods are means that can be used for this fulfillment. For example, the article on social justice includes the following statement: "Respect for the human person proceeds by way of respect for the principle that 'everyone should look upon his neighbor (without any exception) as 'another self,' above all bearing in mind his life and *the means necessary for living it with dignity*' [*Gaudium et spes* 27.1]." ¹³⁸

From the three senses of human dignity, we must conclude that John Paul, like Thomas, uses human dignity in an analogical way. The source of man's dignity is not the fact that he is an "autonomous subject of moral decision," ¹³⁹ but the fact that he is made in God's image. ¹⁴⁰ This is the most basic sense of dignity. In this sense, man's dignity is constant and inviolable, but not absolute. Man's dignity is always relative to his Creator, the source of that dignity: ¹⁴¹ God has the "absolute sovereignty over life and death,"

¹³⁸ C.C.C. 1931. Emphasis mine. See also n. 2402: "The appropriation of property is legitimate for guaranteeing the freedom and dignity of persons and for helping each of them to meet his basic needs and the needs of those in his charge," and n. 2436: "Unemployment almost always wounds its victim's dignity and threatens the equilibrium of his life."

¹³⁹ *Centesimus Annus* 13.

¹⁴⁰ C.A. 11: "The main thread and, in a certain sense, the guiding principle of Pope Leo's Encyclical, and of all of the Church's social doctrine, is a *correct view of the human person* and of his unique value, inasmuch as 'man ... is the only creature on earth which God willed for itself.' God has imprinted his own image and likeness on man (cf. Gen 1:26), conferring upon him an incomparable dignity, as the Encyclical frequently insists."

¹⁴¹ Robert Hoyler points out some of the difficulties implicit in the view that human life is of infinite or absolute value. Such a view offers little insight on how to act in specific situations, since it can be used either for or against CP. While one often hears the argument that the death penalty violates human dignity, it is also possible to argue that the death penalty is the only punishment for the crime of murder that *respects* human dignity. (489)

whereas man's authority over life is limited and relative.¹⁴² In the second sense, a man has more or less dignity insofar as he acts in accord with the divine exemplar. Through his actions, a man can be a more or less perfect image of the Creator. In the third sense, human dignity is the external conditions in which man can live more and more as an image of God (by increasing in virtue and being receptive to grace).

Which sense of dignity is being used in *E.V.*'s teaching on capital punishment?

Quoting the *Catechism*, *E.V.* says that

If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.¹⁴³

Is it that to kill the evildoer is to disregard his dignity as a man, made in the image of God (the first sense of dignity)? But the encyclical allows for recourse to the punishment of death in some circumstances, however rare. If this penalty was incompatible with the dignity of man as image of God, a dignity which no man forfeits, then public order and safety could not justify it, even in rare cases. By the fact that capital punishment is not ruled out altogether, as abortion and euthanasia are in the same document, we must conclude that the penalty is not simply and in itself a violation of the basic dignity of human life.¹⁴⁴

¹⁴² *E.V.* 66. See also nn. 47, 52, 53, 73.

¹⁴³ John Paul II, Encyclical letter *Evangelium Vitae* (25 March 1995), n. 56. The encyclical quotes the early edition of the new catechism (the English translation was published in 1994). When the *Editio Typica* was issued in 1997, it included the reference to *Evangelium Vitae*.

¹⁴⁴ Avery Cardinal Dulles makes this argument in an article written for *First Things*, "Catholicism and Capital Punishment." Citing the authority of the Christian tradition, including recent popes such as Pius XII

Problems also arise when we read the passage as referring to the third sense of dignity—those goods and conditions which are necessary for man to reach the perfection, and therefore the full dignity, of human nature. By depriving someone of bodily life, one takes away the most basic condition necessary for him to live a truly human life. So in that sense, CP certainly takes away dignity. But all punishment always takes away some good, something that could be used as means for attaining human perfection. The prisoner has a limited scope in which he can perfect his faculties and pursue virtue. In this sense, all punishments deprive man of some of his dignity. John Paul cannot mean to discourage punishments that deprive men of lesser external goods, since he is promoting non-lethal punishments as alternatives to the death penalty. Therefore, we can rule out the third sense of dignity here. We can also rule out the idea that the encyclical condemns every violation of dignity, since dignity includes this third sense.

E.V. 56 is more reasonably interpreted as referring to dignity in the second sense, the dignity that is determined by the goodness or evil of the individual's own will. But if this is the sense of dignity that John Paul has in mind, this has more to do with the dignity of the one punishing than the dignity of the one being punished. For it is in what one does, not what one suffers, that virtue is acquired or lost.¹⁴⁵ While he does not say that to inflict CP violates the moral law (which indeed is ruled out, since he allows for its use in rare cases), he does imply that it is more *virtuous* for men not to resort to killing when

and John Paul II, Cardinal Dulles concludes: "In light of all this it seems safe to conclude that the death penalty is not in itself a violation of the right to life."

¹⁴⁵ This is not to say that one cannot acquire virtue (or vice) in suffering, but it is not the fact of suffering something that causes this change, but how one actively endures it; e.g., with patience or impatience, courage or fear, etc.

there are alternative punishments available. *E.V.* gives us some hints as to why this might be the case. The act of taking human life, even when it is justified, always carries the danger of disrespect for human life.¹⁴⁶ The death penalty, though valid, may always become an occasion for hatred or cruelty. The encyclical further implies that when a society cares for the lives even of violent criminals, it offers a powerful witness to the respect it holds for innocent human life.¹⁴⁷ In conclusion, the best interpretation of *E.V.*'s statement on CP is that non-lethal punishments are being encouraged as more in conformity with the dignity of the human person, because more virtuous.

F Conclusion

Among the theological objections addressed in this chapter, I have given particular attention to the apparent contradiction between Thomas and the recent teaching of the Catholic Church. In my response to this apparent contradiction, I argued that the Church, like Thomas, maintains that the death penalty is a legitimate but not a necessary form of punishment. Admittedly, the Church documents do not use Thomas to articulate this position. On the other hand, they do not reject his rationale; nor do they propose some alternative rationale, such as double effect reasoning, in order to make their case. The most reasonable conclusion we can draw is that instead of explicitly defending the legitimacy of the death penalty as a last resort to protect the common good of society, the Church documents presuppose the legitimacy of the punishment. With this presupposition, they focus on reasons to prefer bloodless penalties: these penalties ought

¹⁴⁶ *E.V.* 57: "If such great care must be taken to respect every life, even that of criminals and unjust aggressors, the commandment 'You shall not kill' has absolute value when it refers to the innocent person."

¹⁴⁷ *Ibid.*

to be preferred whenever possible, because they are more in conformity with human dignity and the common good.

It may be that recent Church documents have avoided making use of the Thomistic justification of CP, even where this could have made their reasoning clearer, for fear that such arguments would be misunderstood, or in order to make a clearer case for forgoing the penalty. This is where I hope a clearer understanding of what Thomas actually says about CP will be helpful. Certainly, a more detailed explanation of the notions of common good and human dignity as used in *Evangelium Vitae*, in *Gaudium et Spes*, and in the social encyclicals would be welcome. Until then, I offer these thoughts as a way of reading *Evangelium Vitae* in light of Thomistic principles.

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